IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-241

MR. AND MRS. MALVIN HENNIGAN,
Petitioners,

versus

PLACID OIL COMPANY, ET AL,
Respondents.

PETITION ON BEHALF OF MR. AND MRS. MALVIN HENNIGAN FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

This is an application for a writ of certiorari to the United States Court of Appeals, Fifth Circuit, as to its per curiam decision rendered on June 13, 1974, (*Hennigan v. Placid Oil Co.*, 496 F.2d 876, (reproduced in accompanying Appendix at A-1), affirming a decision of the United States District Court, Western District of Louisiana, whereby petitioners' claim was dismissed on motion for summary judgment rendered

pursuant to F.R.C.P., Rule 54(b). Neither court assigned any reasons for judgment.

JURISDICTION

This application for a writ of review invokes the jurisdiction of the court pursuant to 28 U.S.C. 1254; 28 U.S.C. 2101 and S.Ct. Rules 19, et seq.

QUESTION PRESENTED

Petitioners' son, Gary Neil Hennigan, was an employee of Penrod Oil Company on November 19, 1971, and was working on a stationary platform (or artificial island) in navigable waters off the coast of Louisiana at a point approximately ninety-five (95) miles into the Gulf of Mexico and thus was a longshoreman within the contemplation of the Outer Continental Shelf Lands Act, 43 U.S.C. 1333, as interpreted and applied in *Rodrigue vs. Aetna Casualty & Surety Company*, 89 S.Ct. 1835. On November 19, 1971, he was killed allegedly as a result of the concurrent negligence of agents of his employer, Penrod. Gary Neil Hennigan was unmarried at the time of his death, and left no dependents.

Petitioners, being non-dependents of their deceased son, are ineligible for benefits due to dependents under the Longshoremen's and Harbor Workers' Act, 33 U.S.C. 904 (Reproduced in accompanying Appendix at A-2). Thus, Penrod has incurred no actual liability within the contemplation of 33 U.S.C. 905 as a result of the death of petitioners' son.

Under Louisiana law, made applicable by *Rodrigue,* supra, petitioners have an action in damage against Penrod for the loss of the love, affection and society of their son. Invoking such law, petitioners filed an original complaint before the United States District Court, Western District of Louisiana, Lafayette Division, against Penrod and others seeking the recovery of damage in the amount of ONE HUNDRED FIFTY THOUSAND AND NO/100 ($150,000.00) DOLLARS each. Penrod filed a motion for summary judgment, contending that it was immune from liability to petitioners for the damages sought by virtue of the provisions of 33 U.S.C. 905, notwithstanding that Penrod has incurred no actual liability contemplated by Section 905 of the Longshoremen Act. The District Court granted summary judgment, and the appellate court affirmed that decision. The essential question presented by this application, therefore, is:

> Is a longshoreman employer immune from liability to parents, who are grievously injured by the death of their son, allegedly due to the negligence of the employer, in a *Rodrigue* setting, where,
>
> (a) applicable Louisiana law grants to the parents an independent action in damage for the loss of the love, affection and society of their son,
>
> (b) the parents, being admitted non-dependents, have not received, do not seek, and are not eligible for benefits under the Long-

shoremen's and Harbor Worker's Compensation Act, with the consequence that,

(c) the employer is exposed to *no liability* as contemplated by Section 904 of the Longshoremen's and Harbor Workers' Compensation Act?

CONCISE STATEMENT OF THE CASE

The facts, framed by the pleadings, discovery interrogatories and affidavits, are not in dispute. Petitioners' son was employed by Penrod Oil Company to work on a stationary platform or artificial island in navigable waters at a point approximately ninety-five (95) miles off the coast of Louisiana into the Gulf of Mexico. While acting within the course of that employment on November 19, 1971, he was killed as the result of the alleged concurrent negligence of his employer. Petitioners' son was never married, fathered no children and adopted none, and at the time of his death he had no dependents and contributed to the support of no one.

On October 12, 1972, invoking the provisions of applicable state law, which makes the wrongful killing of petitioners' son an actionable tort, petitioners filed an original complaint in the United States District Court, Western District of Louisiana, Lafayette Division, seeking damages each in the sum of ONE HUNDRED FIFTY THOUSAND AND NO/100 ($150,000.00) DOLLARS for the loss of the love, companionship, affection and society of their son. The complaint was

filed against Placid Oil Company, Penrod Drilling Company, and Penrod's insurer, Hartford Accident & Indemnity Company. The jurisdiction of the District Court was invoked pursuant to the provisions of 43 U.S.C. 1333 and 28 U.S.C. 1332.

In due course, Penrod Drilling Company and Hartford Accident & Indemnity Company filed a motion for summary judgment on the alleged grounds that petitioners' "claim against respondents failed to state a claim upon which relief can be granted and that plaintiffs' exclusive remedy herein against respondents is against (sic) the Longshoremen and Harbor workers' Act." The motion for summary judgment was granted. On motion of petitioners, invoking the provisions of Rule 54(b) of the Federal Rules of Civil Procedure, the District Court entered a final judgment on January 3, 1974, dismissing Penrod Drilling Company as a defendant in these proceedings.

Petitioners filed their notice of appeal, returnable to the Court of Appeals, Fifth Circuit, on January 10, 1974.

The Court of Appeals, Fifth Circuit, placed petitioners' appeal on its summary calendar pursuant to Rule 18, Fifth Circuit, and on June 13, 1974, the Court of Appeals rendered a per curiam decision pursuant to local Rule 21, reading in its entirety: "AFFIRMED." (496 F.2d 876).

Neither the District Court nor the Court of Appeals assigned any reasons for the dismissal of petitioners'

cause of action against Penrod. It is assumed, however, that it is based upon the grounds urged in the motion for summary judgment. Petitioners seek a writ of certiorari to review the decision of the Court of Appeals, Fifth Circuit.

SUMMARY OF ARGUMENT

In the factual setting of the controversy presented by this petition, the Outer Continental Shelf Lands Act, 43 U.S.C. 1331, et seq., (hereinafter "Lands Act"; reproduced in accompanying Appendix at A-3) applies. *Rodrigue*, supra, teaches that "this law was to be federal law of the United States, applying state law only as federal law and then only when not inconsistent with applicable federal law." 89 S.Ct. at P. 1837.

Applicable Louisiana law consists of Louisiana Civil Code, Articles 2315, 2316, 2317, and 2320. This state law creates and imposes a primary duty upon Penrod not to negligently kill petitioners' son and makes any such wrongful killing an actionable tort. This law also confers upon petitioners the right to recover against Penrod for the loss of the society of their son, in the event of a breach by Penrod of the primary duty not to negligently kill their son. This cause of action is conferred directly and exclusively upon petitioners. The assertion by petitioners of their claim in this lawsuit, therefore, is not an assertion of any right which their deceased son might have. Petitioners do not claim "under or through" their son. Theirs is an assertion of their rights on account of the breach of an independent duty imposed upon their son's employer and owed to

them by the employer as the result of the provisions of Louisiana law.

This state law — this cause of action — must prevail as federal law unless and until it is ousted by applicable, inconsistent federal law, because, "for federal law to oust adopted state law, federal law must first apply." *Rodrigue*, 89 S.Ct. at P. 1839.

Implicit in the non-opinion decisions of the courts below is the conclusion that these courts assumed that the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901, et seq., and particularly Sections 904 and 905, applied and that such federal law, being inconsistent with the state law invoked by petitioners, ousted applicable state law. However, a careful scrutiny of the Longshoremen's Act and the jurisprudence interpreting it compels the conclusion that the courts below committed reversible error in espousing such a conclusion.

Given a situation where an employer actually incurs liability as prescribed in Section 904, it would appear that the literal wording of Section 905 lends support to the decisions of the court below. The literal wording indicates that the incurrence of liability by the employer to pay the benefits prescribed by Section 904 insulates him against any "other liability" to "parents" and "anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death." But this is not the case. This is not the case because in deciphering the purpose and meaning of Section 905 "we cannot * * consider the

wording of the statute alone," nor can there be "blind adherence to the superficial meaning of" the Longshoremen's Act. *Reed vs. Steamship Yaka*, 373 U.S. 410, 83 S.Ct. 1349, 1353. This section of the Longshoremen's Act must be viewed "in the light of our prior cases • • the holdings of which have been left unchanged by Congress." *Reed*, 83 S.Ct. at P. 1353. In fact petitioners are not "parents" within the contemplation of Section 905, because they are not dependents of the injured employee. Section 902 (15).

The construction of Section 905 in a manner that avoids "blind adherence to the superficial meaning of the Longshoremen's Act" has led to a series of decisions by our Supreme Court casting a Section 905 employer for "other liability" in favor of others "otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death" of an employee, *even where the employer has actually incurred the liability prescribed in Section 904.* The result of this jurisprudence is to the effect that where a third person, such as petitioners, is suing in his or her own right on account of the breach of some independent duty owed to them by the employer, such as is involved in their case, even though the operative facts out of which this independent right and correlative duty arose are the same as those out of which the injured employee recovers under the Act, Section 905 of the Act does not proscribe the third person's cause of action. The decisions of the courts below holding that Section 905 does apply and does proscribe petitioners' cause of action is contrary to the decisions of our Supreme Court and therefore must be reversed.

ARGUMENT

Before Congress enacted the Outer Continental Shelf Lands Act, 43 U.S.C. 1331, et seq., (hereinafter "Lands Act"), persons working on fixed structures over navigable waters beyond a marine league from the continental shoreline worked in a legal no man's land, without right to redress injuries, fatal and non-fatal, negligently inflicted on them. Death on the High Seas Act did not apply, because the structures were not navigable aids and bore no relation to such functions. *Rodrigue*, 89 S.Ct. at P. 1835. The Jones Act and general maritime law likewise did not apply, because the structures were not vessels. 89 S.Ct. at P. 1841. State law did not apply because these structures were beyond the sovereignty reach of the states. With the passage of the Lands Act a new body of law was created and made applicable to these structures. *Rodrigue* teaches that "this law was to be federal law of the United States, applying state law only as federal law and then only when not inconsistent with applicable federal law". *Rodrigue*, 89 S.Ct. at P. 1837.

Petitioners' son was negligently killed while on a fixed platform over navigable waters ninety-five (95) miles off the coast of Louisiana. Thus, this occurrence falls within the contemplation of the Lands Act. Louisiana law, therefore, is applicable as federal law to the extent not inconsistent with applicable federal law. In part pertinent, the Louisiana Civil Code provides:

Article 2315:

"Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.

* * *

"The right to recover all other damages caused by an offense or quasi offense, if the injured person dies, shall survive for a period of one year from the death of the deceased in favor of: * * * (2) the surviving father and mother of the deceased, or either of them, if he left no spouse or child surviving; * * *. *The survivors in whose favor this right of action survives may also recover the damages which they sustained through the wrongful death of the deceased.* * * *"

Article 2316:

"Every person is responsible for the damage he occasions not merely by his act, but by his negligence, his imprudence, or his want of skill."

Article 2317:

"We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody. This, however, is to be understood with the following modifications."

Article 2320:

"Masters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed. * * *"

Louisiana Civil Code, Article 2315, as authoritatively interpreted by Louisiana courts, exemplified by *Reed vs. Warren*, (1931) 172 La. 1082, 136 So. 59,[1] creates

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[1]136 So. at P. 61

"The case depends upon the construction to be put upon the provisions of article 2315 of the Civil Code, which, by the several amendments of the article, give a right of action for damages for the death of a person, in addition to the right of action in favor of certain surviving relations for damages for personal injuries suffered by a person who thereafter died. Under the article as originally enacted, which was article 16 of title 4, book 3 of the Digest of 1808, and which became article 2294 of the Civil Code of 1825, an action for damages for personal injuries abated on the death of the person injured. Hubgh v. N.O. & C.R.R.Co., 6 La.Ann 498, 54 Am Dec. 565. The article then merely declared: 'Every act whatever of man, that causes damages to another, obliges him, by whose fault it happened, to repair it.' By Act No. 223 of 1855, the article was amended by the addition thereto: 'The right of this action shall survive in cases of death in favor of the minor children and widow of the deceased or either of them, and in default of these in favor of the surviving father and mother or either of them, for the space of one year from the death.' As thus amended the article was adopted as article 2315 of the Civil Code in the revision of 1870. Even then, the article gave a right of action, to the survivors mentioned, for only such suffering as the injured person had endured, and gave no right of action for any loss or injury suffered by a surviving relation, by the death of a person fatally injured. Earhart v. N. O. & C. R. R. Co., 17 La.Ann 243; McCubbin, Tutor, v. Hastings, 27 La.Ann. 713; Vredenburg v. Behan, 33 La.Ann. 627; Walton v. Booth, 34 La.Ann. 913; Van Amburg v. V., S. & P. Ry. Co., 37 La.Ann. 650, 55 Am. Rep. 517.

several causes of action for wrongful death. There is the right to recover the pecuniary loss sustained by a dependent survivor. There is the right to recover for the pains and sufferings endured by the deceased during the interim between injury and death. And finally, there is the right to recover for the loss of the society of the deceased. *Dougherty vs. New Orleans Railroad & Light Co.*, (1913) 133 La. 993, 63 So. 493; *Reed vs. Warren*, supra; *Norton vs. Crescent City Ice Manufacturing Co.*, (1933) 146 So. 753; *Gray vs. Nathan*, (1969) 221 So.2d 859. The cause of action for the loss of the society of their son is conferred directly and exclusively upon petitioners. It is not derivative of nor does it arise from their son. Thus the assertion of their claim in this lawsuit is not an assertion of any right which their son might have had. Theirs is an assertion of their rights on account of the breach of an independent duty imposed upon their son's employer and owed to them by the employer as a result of the provisions of Louisiana Civil Code, Article 2315. This state law creates and imposes a primary duty upon Penrod not to negligently kill their son and makes any such wrongful killing an actionable tort. In the

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[1]Continued

"It was by Act No. 71 of 1884 that the article was amended so as to give to the survivors therein mentioned a right of action for the damages suffered by them by the death of the person fatally injured through the fault of another. The amendment consisted of the adding of this sentence: 'The survivors above mentioned may also recover the damages sustained by them by the death of the parent or child, or husband or wife, as the case may be.' By Act No. 120 of 1908, the article was amended so as to extend the right of action to the brothers and sisters, or either of them, in the event that none of the relations already mentioned in the article survived the injured person. * * *"

pursuit of their claim, therefore, petitioners are third persons vis-a-vis their son's employer, Penrod. As such, Penrod is liable in damages to petitioners.

This state law — this cause of action — must prevail as federal law unless and until it is ousted by applicable inconsistent federal law, because "for federal law to oust adopted state law, federal law must first apply." *Rodrigue,* 89 S.Ct. at P. 1839.

Implicit in the nonopinion decisions of the courts below is the conclusion that these courts assumed that the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901, et seq., and particularly Sections 904 and 905, applied and that such federal law, being inconsistent with the state law invoked by petitioners, ousted applicable state law. However, a careful scrutiny of the Longshoremen's Act and the jurisprudence interpreting it compels the conclusion that the courts below committed reversible error in espousing such an assumption.

The erroneous assumption of the courts below is based upon the conclusion that Section 905, which speaks of an employer's exclusiveness of liability, creates an all-inclusive immunity in favor of an employer against any other liability, which is absolute and inflexible and applicable, *whether or not* the employer is actually liable for the benefits spelled out in Section 904 of the Longshoremen's Act. Such a conclusion, however, is at war with the humanitarian policy of the Lands Act to show special solicitude for those who are injured within its jurisdiction. Such a conclusion is also

contrary to the jurisprudence which has dealt with the exclusiveness of liability of Section 905 and other comparable exclusivity provisions of federal law.

Perhaps the beginning point of demonstrating reversible error is a quotation of Section 905, relied upon by the courts below. It reads:

> "The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee."

Given a situation where an employer actually incurs liability as prescribed in Section 904, it would appear that the literal wording of Section 905 lends support

to the decisions of the court below. The literal wording indicates that the incurrence of liability by the employer to pay the benefits prescribed by Section 904 insulates him against any "other liability" to "parents" and "anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death." But this is not the case. This is not the case because in deciphering the purpose and meaning of Section 905 "we cannot ** consider the wording of the statute alone", nor can there be "blind adherence to the superficial meaning of" the Longshoremen's Act, said the court in *Reed vs. Steamship Yaka,* 373 U.S. 410, 83 S.Ct. 1349, 1353. This section of the Longshoremen's Act must be viewed "in the light of our prior cases ** the holdings of which have been left unchanged by Congress." *Reed,* 83 S.Ct. at p. 1353.

The superficial meaning of the word "parents" contained in Section 905 would seemingly include petitioners. Actually, that word does not include petitioners. The term or word "parents" as used in 905 is defined in Section 902(15) as follows:

> "The term 'parent' includes step-parents and parents by adoption, parents-in-law, and any person who for more than three years prior to the death of the deceased employee, stood in the place of a parent to him, *if dependent on the injured employee.*"

Thus to be a "parent" in the contemplation of Section 905 one must be "dependent on the injured employee."

It is an uncontradicted fact that petitioners were not dependent on their son at any time material to this litigation. They are his parents in the biologic sense and not as contemplated by Section 905. In that status under applicable Louisiana law, petitioners have an indestructible cause of action to recover damages for the loss of the society of their son.

The construction of Section 905 in a manner that avoids "blind adherence to the superficial meaning of the Longshoremen's Act" has led to a series of decisions casting an employer for "other liability" in favor of others "otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death" of an employee, *even where the employer had actually incurred the liability prescribed in Section 904.* Such jurisprudence instances an interpretation of Section 905 contextually with other statutes and consistently with the rationale and purpose of the Longshoremen's Act.

Perhaps the first significant decision pertinent to our inquiry was rendered in *Hitaffer vs. Argonne Co.*, (1950) 183 F.2d 811. This case instances a lawsuit, filed in the District Court in the District of Columbia, by a wife for loss of consortium arising out of injuries sustained by her husband, who had received compensation for his injuries pursuant to the Longshoremen's Act. Her claim was dismissed by the District Court on defendant's plea that Section 905 excluded any such "other liability". That decision was reversed on appeal. In reversing, and in speaking to the pro-

scription against other liability contained in Section 905, the Court observed: (183 F.2d at Pp. 819-820)

> "There can be no doubt but that this section is designed to make the employer's liability under this statute exclusive of any other liability either at law or in admiralty to the injured employee or anyone suing in the employee's right. *But where a third person is suing in his or her own right on account of the breach [of] some independent duty owed them by the employer, even though the operative facts out of which this independent right and correlative duty arose are the same as those out of which the injured employee recovers under the Act, the Act does not proscribe the third person's cause of action.* * * *"

In the course of the opinion the court adverted to several decisions of the District Court pertinent to its inquiry and approvingly quoted the following pertinent language: (183 F.2d at P. 820)

> "* * * 'Nicholson having secured the payment to its employees of compensation under the Longshoremen's and Harbor Workers' Compensation Act * * * is immune from suits for damages resulting from libellant's injuries brought by the libellant or anyone in his right, according to the provision of Section 905 of the Act. *But the right in admiralty to contribution between wrongdoers does not stand on subrogation but arises directly from the*

tort. * * * The immunity given Nicholson by the statute from suits arising out of libellant's injuries *furnishes no defense against Hedger's claim to contribution as between joint tort-feasors.'*

"And in the case of *Rich v. United States* where the injured employee, after receiving benefits under the statute for some months, elected to sue the ship owner, the United States, for whom he and his employer were working when the injury occurred, the court allowed the employer to be brought in by third party practice, despite his contention that his liability on account of the injury was exclusive under the Act, saying: '* * * [T]*he third party does not sue the employer for damages "on account of" the injury to or death of the employee but for breach of an independent duty owing to the third party by the employer.*' 177 F.2d at P. 691.

"In this jurisdiction the action for loss of consortium does not stand on subrogation but arises directly from the tort. Thus in *Lansburgh & Brothers vs. Clark*, where the husband joined in his wife's action for injuries sustained in the defendant's store, a jury verdict denying the wife recovery but giving damages to the husband for loss of consortium was upheld, this court saying: '* * * *In the prosecution of these separate and independent rights there is no privity, and a judgment against one*

is not a bar to an action by the other.' (75 U.S. App.D.C. 339, 127 F.2d 332)."

Finally the court concluded: (183 F.2d at P. 820)

"There can be no doubt, therefore, the injury to the consortium is an injury to a right which is independent of any right in the other spouse and to which the defendant owes an independent duty. And in view of the fact that this appellant is suing in her own right for the breach of an independent duty owing her, we cannot say that the Act was designed to deprive her of her action.

"*Moreover it would be contrary to reason to hold that this Act cuts off independent rights of third persons when the whole structure demonstrates that it is designed to compensate injured employees or persons suing in the employee's right on account of employment connected disability or death. It can hardly be said that it was intended to deprive third persons of independent causes of action where the Act does not even purport to compensate them for any loss.*"

The defendant employer applied for a writ of certiorari to review this decision but significantly certiorari was denied on October 16, 1950. *Argonne Co., Inc. vs. Hitaffer*, 340 U.S. 852, 71 S.Ct. 80. As this decision was permitted to stand by this court it meant that a third person (a person not entitled to the benefits

of Section 904) suing in his own right on account of the breach of some independent duty owed to him by the employer, even though the operative facts out of which the independent right and correlative duty arose were the same as those out of which the injured employee might recover under the Act, was not barred by the proscription of Section 905. The court's tacit approval of *Hitaffer*, reflected by the denial of the writ of certiorari, was adumbrative of the decisions of the Supreme Court that were to follow, which carved out additional exceptions to the proscription of Section 905 consistent with the doctrine of *Hitaffer*.

The first case to reach the court after *Hitaffer* in 1952 was indecisive of the question resolved in *Hitaffer*. *Halcyon Lines, et al, vs. Haenn Ship Ceiling and Refitting Corp.*, 342 U.S. 282, 72 S.Ct. 277. In that case Halcyon Lines hired Haenn Ship Corporation to make repairs on a Halcyon ship which was moored in navigable waters. One of Haenn's employees was injured aboard ship while engaged in making these repairs. Alleging that his injuries were caused by Halcyon's negligence and the unseaworthiness of its vessel, he brought action for damages against Halcyon. Halcyon impleaded Haenn as a joint tort-feasor. The District Court treated Halcyon and Haenn as joint tort-feasors and condemned each to pay half of the damages as reflected in the judgment rendered in favor of the injured employee. The Court of Appeals modified the decision and limited Haenn's duty of contribution to its liability for longshoremen benefits due to employees. The court granted certiorari "because of the conflicting views taken by the circuit as to the existence

of and the extent to which contribution can be obtained in cases such as this." The court spoke to the admiralty doctrine of contribution between mutual wrongdoers and said, "This maritime rule is of ancient origin and has been applied in many cases, but this court has never expressly applied it to non-collision cases. Halcyon now urges us to extend it to non-collision cases and to allow a contribution here based upon the relative degree of fault of Halcyon and Haenn as found by the jury. Haenn urges us to hold that there is no right of contribution, or in the alternative, that the right be based upon an equal division of all damages." 72 S.Ct. at P. 279. The court declined to make any judicial inroads into Section 905 and ordered the dismissal of the contribution proceedings against Haenn saying: (72 S.Ct. at P. 280)

> "We have concluded that it would be unwise to attempt to fashion new judicial rules of contribution and that the solution of this problem should await congressional action. * * *"

But congressional action was not forthcoming. In 1956 the court was again confronted with the essentially same disturbing question presented by *Halcyon. Ryan Stevedoring Co., Inc., v. Pan-Atlantic Steamship Corporation,* 350 U.S. 124, 76 S.Ct. 232. The essential facts and the questions presented in *Ryan* are succinctly stated by the court in these words: (76 S.Ct. at P. 233)

> "This case presents two questions as to the liability of a stevedoring contractor to reim-

burse a shipowner for damages paid by the latter to one of the contractor's longshoremen on account of injuries received by him in the course of his employment on shipboard.

1. The first question is whether the Longshoremen's and Harbor Workers' Compensation Act precludes a shipowner from asserting such a liability.

2. The second is whether the liability exists where a contractor, without entering into an express agreement of indemnity, contracts to perform a shipowner's stevedoring operations and the longshoreman's injuries are caused by the contractor's unsafe stowage of the ship's cargo. * * *"

The court answered the first question negatively and held that notwithstanding the literal wording of Section 905, the employer was liable to the shipowner. In so holding, the court said: (76 S.Ct. at P. 235)

"* * * The Act nowhere expressly excludes or limits the shipowner's right, as a third person, to insure itself against such a liability either by a bond of indemnity, or the contractor's own agreement to save the shipowner harmless. Petitioner's agreement in the instant case amounts to the latter for, as will be shown, it is a contractual undertaking to stow a cargo 'with reasonable safety' and thus

> to save the shipowner harmless from petitioner's failure to do so."

The court then reasoned that the stevedoring contractor had failed to carry out its contractual obligation and this failure brought about the injuries. Thereupon the court concluded: (76 S.Ct. at P. 235-236)

> "'* * * Such a liability springs from an independent contractual right. It is not an action by or on behalf of the employee and it is not one to recover damages 'on account of' an employee's 'injury or death'. It is a simple action to recover, under a voluntary and self-sufficient contract, a sum measured by foreseeable damages occasioned to the shipowner by the injury or death of a longshoreman on its ship."

The court then likened this liability to that of a supplier of defective ship's gear to a shipowner who sues for reimbursement for damages due to a longshoreman for injury or death of the longshoreman as the result of such defective gear. Significantly then the court said, "The coincidence that the loading contractor here happens to be the employer of the injured longshoreman makes no difference in principle. While the Compensation Act protects a stevedoring contractor from actions brought against it by its *employee* on account of the contractor's tortious conduct causing *injury* to the employee, the contractor has no logical ground for relief from the full consequences of its independent contractual obligation, voluntarily assumed to the

shipowner, to load the cargo properly." (76 S.Ct. at P. 236)

The court thus fashioned a judicial rule of liability of an employer which extended over and beyond the employer's liability for benefits prescribed by Section 904, notwithstanding the proscription against "other liability" demonstrated by the literal wording of Section 905. At this point in the development of the jurisprudence, the employer's "additional" liability was limited to one arising out of contract. The court declined to determine whether or not the employer could be held liable for the breach of a noncontractual duty notwithstanding the proscription of Section 905. In so declining, the court observed: (76 S.Ct. at P. 237)

> "* * * Because respondent in the instant case relies entirely upon petitioner's contractual obligation, we do not meet the question of a noncontractual right of indemnity or of the relation of the Compensation Act to such a right."

In 1958 a similar controversy as in *Ryan* was presented with the added question of whether the third party claimant had a right to trial by a jury of his third party claim. *Weyerhaeuser Steamship Co. vs. Nacirema Operating Co., Inc.*, 355 U.S. 563, 78 S.Ct. 438. Respondent, a stevedoring company, contracted to furnish petitioner, a shipowner, with stevedoring services and a longshoreman employed by respondent was injured while unloading petitioner's vessel. In response to the longshoreman's lawsuit, petitioner im-

pleaded respondent claiming a right to indemnity for any damages the longshoreman might recover. The jury awarded a verdict to the longshoreman and against the shipowner and after receiving the verdict the judge decided that it was dispositive of the third party action and directed a verdict for respondent.

On review this court essentially reiterated what was said in *Ryan*, as to the effect of a stevedoring company undertaking to faithfully furnish stevedoring services as may be required, by holding that a breach of such a contractual undertaking renders it liable to a shipowner for all damages which the shipowner must pay to the stevedoring employee injured as a result of the failure of the stevedoring company to properly discharge its contractual undertaking. The scope of the stevedoring company's contractual undertaking was extended beyond the compass of *Ryan* in these words: (78 S.Ct. at P. 441)

> "We believe that respondent's contractual obligation to perform its duties with reasonable safety related not only to the handling of cargo, as in *Ryan, but also to the use of equipment incidental thereto*, such as the winch shelter involved here."

Weyerhaeuser was followed in 1959 by *Crumady vs. The Joachim Hendrik Fisser*, 358 U.S. 423, 79 S.Ct. 445. *Crumady* instances the watering down of the contract basis of liability of a stevedore employer beyond the proscription of Section 905.

Petitioner Crumady was an employee of a stevedoring company engaged in transferring a cargo of lumber from the ship *Joachim Hendrik Fisser* of German registry to a pier at Newark, New Jersey. While so engaged, he was injured and brought admiralty suit by libel in rem against the vessel. The vessel impleaded the stevedoring contractor.

The District Court found the vessel unseaworthy and held it liable to the stevedore. The District Court also directed the stevedoring company to indemnify the vessel to the extent of the judgment against the vessel on the finding that the vessel was rendered unseaworthy as a result of the wrongful conduct of the stevedoring company's employees. The Court of Appeals reversed, holding that the vessel was not unseaworthy. On petition to this Court, however, the decision of the Court of Appeals was reversed. On the question of the third party action of the vessel against the stevedoring company, the stevedoring company contended that it had contracted for stevedoring service not with the vessel owner but with the charterer of the vessel and that, therefore, there was no contractual basis for the vessel's third party claim against the stevedoring company. The court rejected that contention and in so doing expanded the class of persons not included in the proscription of Section 905 to third party beneficiaries. Said the court in so holding: (79 S.Ct. at P. 448)

> "We think this case is governed by the principle announced in the Ryan case. The warranty which a stevedore owes when he goes aboard a vessel to perform services is plainly

> for the benefit of the vessel whether the vessel's owners are parties to the contract or not. That is enough to bring the vessel into the zone of modern law that recognizes rights in third-party beneficiaries. * * *"

Thus as of 1959 the right to recover "other liability" against a Section 905 employer on account of the breach of some independent duty owed to the claimant by the employer, even though the operative facts out of which the independent right and correlative duty arose were the same as those out of which the injured employee could recover under the Act, was extended to third party beneficiaries of contracts creating the duty that was breached.

Crumady was followed in 1960 by *Waterman S.S. Corp. vs. Dugan & McNamara, Inc.*, 364 U.S. 421, 81 S.Ct. 200. *Waterman* instances an extension of the third party beneficiary theory of liability enunciated in *Crumady*.

In *Waterman* the owner of the vessel was sued by a longshoreman who was injured while aboard the vessel in the course of his employment with the defendant stevedoring company. The vessel owner settled his claim before trial and by way of a third party complaint sought to recover from the stevedoring company the amount which he paid in satisfaction of the longshoreman's claim. In defense to the third party claim the stevedoring company alleged that "there had been no direct contractual relationship between it and the petitioner covering the stevedoring services ren-

dered." At trial it was stipulated by the parties that this allegation was correct, "it appearing that the consignee of the cargo, not the petitioner, had actually engaged the respondent to unload the ship." The District Court directed a verdict for the respondent holding that the shipowner "had no right of indemnity against the stevedore under the circumstances alleged in the absence of a direct contractual relationship between them." The Court of Appeals affirmed. Certiorari was granted "to consider whether in a situation such as this the absence of a contractual relationship between the parties is fatal to the indemnity claim." The essential difference between the factual issues of *Crumady* and *Waterman* is that in *Crumady* the contract with the stevedoring company was between the charterer of the vessel and the stevedoring company, whereas in *Waterman* the contract was between the stevedoring company and the consignee of the cargo. In further watering down the contract basis of liability and extending *Crumady*, the court reasoned as follows: (81 S.Ct. at P. 202)

> "* * * We can perceive no difference in principle, so far as the stevedore's duty to indemnify the shipowner is concerned, whether the stevedore is engaged by an operator to whom the owner has chartered the vessel or by the consignee of the cargo. Nor can there be any significant distinction in this respect whether the longshoreman's original claim was asserted in an *in rem* or an *in personam* proceeding. In the Ryan and Weyerhaeuser cases *in personam* liability was asserted. In

> the Crumady case the injured stevedore had brought an *in rem* proceeding. The ship and its owner are equally liable for a breach by the contractor of the owner's nondelegable duty to provide a seaworthy vessel. *The Osceola*, 189 U.S. 158, 175, 23 S.Ct. 483, 487, 47 L.Ed. 760; cf. *Continental Grain Co. vs. Barge FBL-585*, 364 U.S. 19, 80 S.Ct. 1470, 4 L.Ed.2d 1540. The owner no less than the ship, is the beneficiary of the stevedore's warranty of workmanlike service."

Waterman was followed on April 1, 1963, by *Weyerhaeuser Steamship Company vs. United States*, 372 U.S. 597, 83 S.Ct. 926. As we have seen up until *Weyerhaeuser*, the "other liability" assessable against a Section 905 employer was confined to that liability resulting from the breach by the employer of a contractual duty. *Weyerhaeuser* instances an enlargement of the employer's "other liability" by bringing within the compass of Section 905 the concept of "negligence" as a basis for the employer's liability over and beyond his liability prescribed by Section 904. *Weyerhaeuser* involved a collision between a vessel belonging to the United States and one belonging to Weyerhaeuser. Weyerhaeuser brought action against the United States under the Public Vessels Act to recover his damages. A cross bill was filed, and the District Court after a hearing found that the collision had occurred through the mutual fault of both vessels. Applying the federal admiralty rule of divided damages the court held that each party was entitled to recover

from the other one-half of its provable damages and court costs.

An employee of the United States aboard the United States vessel sustained injuries in the collision. He received compensation for these injuries under the Federal Employees' Compensation Act. He also filed a claim against Weyerhaeuser to recover damages. His lawsuit was settled by Weyerhaeuser paying the employee $16,000.00 and the employee then repaid the United States for the amount which had previously been awarded him as statutory compensation, as required by the Compensation Act. Weyerhaeuser included as part of his provable damages the $16,000.00 which he paid to the government employee. The parties stipulated that the $16,000.00 payment constituted reasonable settlement of the employee's claim, but the government took the position that under the exclusivity provision of Section 7(b) of the Federal Employees' Compensation Act the government's liability was limited to compensation benefits payable to its employees.

The District Court rejected the government's position and entered the decree which recognized the $16,000.00 paid by Weyerhaeuser as part of his provable damages. The Court of Appeals reversed, "remanding the case to the District Court with directions to recompute the damages after excluding the Ostrom settlement," holding that the exclusive liability provisions of Section 7(b) of the Compensation Act precluded any liability of the United States on account of the petitioner's payment for Ostrom's personal injury. Certiorari was granted and the Court of Appeals'

decision was reversed. The holding of the court in *Weyerhaeuser* is controlling of the question presented by petitioner's application for certiorari because the court held that for all practical purposes the exclusivity clause of the Federal Employees' Compensation Act was identical with the exclusivity provision of Section 905. In reversing, the court held: (83 S.Ct. at Pp. 929-930)

> *"Section 5 of the Longshoremen's and Harbor Workers' Compensation Act is nearly identical to Section 7(b) of the Federal Employees' Compensation Act* in providing that '[t]he liability of an employer * * * shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death * * *.' In Ryan Stevedoring Co. vs. Pan-Atlantic S.S. Corp., 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133, it was held that despite this exclusive liability provision, a shipowner was entitled to reimbursement from a longshoreman's employer for damages recovered against the shipowner by the longshoreman injured by the employer's negligence. The Court's decision in Ryan was based upon the existence of a contractual relationship between the shipowner and the employer. In a series of subsequent cases, the same result was reached, although the contractual relationship was

considerably more attenuated. Weyerhaeuser S.S.C. vs. Nacirema Co., 355 U.S. 563, 78 S.Ct. 438, 2 L.Ed.2d 491; Crumady vs. The Joachim Hendrik Fisser, 358 U.S. 423, 79 S.Ct. 445, 3 L.Ed.2d 413; Waterman S.S. Corp. vs. Dugan & McNamara, 364 U.S. 421, 81 S.Ct. 200, 5 L.Ed.2d 169.

"*In the present case there was no contractual relationship between the United States and the petitioner, governing their correlative rights and duties.* There is involved here, instead, a rule of admiralty law which, for more than 100 years, has governed with at least equal clarity the correlative rights and duties of two shipowners whose vessels have been involved in a collision in which both were at fault. * * *

"In this case, as in The Chattahoochee, we hold that the scope of the divided damages rule in mutual fault collisions is unaffected by a statute enacted to limit the liability of one of the shipowners to unrelated third parties. The judgment is reversed."

Thus, *Weyerhaeuser* in effect held that a Section 905 employer can be cast for "other liability" beyond that liability prescribed in Section 904 for damages sustained by someone other than an employee as a result of the wrongful conduct or negligence of the employer, even though the operative facts out of which the right to recover and the correlative duty arose are the same

as those out of which the injured employee recovers under the act.

Weyerhaeuser was followed on April 22, 1963, by the equally important case of *Treadwell Construction Co. vs. United States*, 372 U.S. 772, 83 S.Ct. 1102. *Treadwell* reversed the decision of the Third Circuit Court of Appeals, in *Drake vs. Treadwell Construction Co.*, 299 F.2d 789. This litigation began as a diversity suit in which plaintiff Drake, an employee of the United States, sued Treadwell for a negligent injury suffered when a steel expansion tank, manufactured by Treadwell for the United States, exploded while Drake and others were testing ordnance at a government arsenal. Treadwell brought the United States into the suit by filing a third party claim for indemnity and contribution.

The trial resulted in a finding that the tank had been negligently fabricated and a recovery of damages by Drake against Treadwell was permitted. On the third party claim, the trial court found that negligence by the United States was also a responsible cause of Drake's injury. Accordingly judgment was rendered on the third party claim: (299 F.2d at P. 790)

> "'* * * that the defendant, Treadwell Construction Company, and the third party defendant, United States of America, are joint tort-feasors and that the right of contribution exists in favor of the said defendant, Treadwell Construction Company, and against the United States of America, and the said Tread-

well Construction Company may hereafter have judgment against the said United States of America for the amount of $180,000 which it has paid to the plaintiff, Joseph Drake, in excess of a sum of $90,000.' "

The Court of Appeals pointed to Section 7(b) of the Federal Employees' Compensation Act, considered by the court in *Weyerhaeuser,* and held that by virtue of the exclusivity clause in question there could be no judgment of contribution against the United States. In rationalizing its decision and in speaking to the exclusivity clause of Section 7(b), the court said: (299 F.2d at Pp. 790-791)

> "On its face this subsection withdraws whatever consent the Tort Claims Act, considered done, would otherwise give to the imposition of tort liability upon the United States on account of the injury of an employee covered by the Compensation Act, whether the claim is asserted in the interest of the injured employee or anyone else. Contribution required of a joint tort-feasor toward the satisfaction of a covered government employee's judgment in tort seems as clearly within the language of Section 7(b) as is total direct liability to the injured employee. * * *"

On application for writ of certiorari in a per curiam opinion, this court reversed, holding: (83 S.Ct. 1102)

> "The petition for writ for certiorari is granted. The judgment of the United States Court

of Appeals for the Third Circuit is vacated and the case is remanded to the United States District Court for the Western District of Pennsylvania for further consideration in light of *Weyerhaeuser Steamship Co. vs. United States*, 372 U.S. 597, 83 S.Ct. 926."

With the advent of the *Treadwell* decision, the circle was made complete. Notwithstanding the literal wording of Section 905, the workings of the court from 1956 in *Ryan* to 1963 in *Treadwell* developed as correct law the doctrine of *Hitaffer*, supra, which is that "where a third person is suing in his or her own right on account of a breach [of] some independent duty owed them by the employer, even though the operative facts out of which this independent right and correlative duty arose are the same as those out of which the injured employee recovers under the Act, the Act does not proscribe the third person's cause of action." Thus, any breach of duty by the employer, whether that duty arises from contract or negligence which results in damage to a third person, obliges the employer to respond in damages to the injured person, even though the operative facts out of which the independent right of recovery and the correlative duty breached arose are the same as those out of which the injured employee might recover under the act.

The decision of the Court of May 28, 1974, in *Cooper Stevedoring Company, Inc. vs. Fritz Kopke, Inc.*, 94 S.Ct. 2174, permits recovery on a cause of action sounding in tort against a Section 905 employer over and beyond his liability prescribed in Section 904. In this

case a longshoreman was injured when, while loading a vessel, he stepped into a concealed gap between crates which had previously been loaded by Cooper Stevedoring Company, Inc. The longshoreman then sued the vessel owner and the time charterer of the vessel. These defendants filed a third party complaint against the Cooper Stevedoring Company. The District Court found both the vessel owner and the charterer on the one hand as well as Cooper Stevedoring Company negligent, and divided the liability equally. On appeal, Cooper contended that the District Court's award of contribution in a non-collision maritime case was contrary to the jurisprudence. The appellate court rejected the contention and affirmed. On certiorari, the Court affirmed, holding that a Section 905 employer should be held liable beyond the liability prescribed in Section 904 as a joint tort-feasor in a non-collision maritime case.

These decisions of the court, making possible petitioners' right to maintain their cause of action against Penrod are rooted in a sound principle of statutory construction. Said the court in *Moragne vs. States Marine Lines, Inc.*, (1970) 398 U.S. 375, 90 S.Ct. 1772, 1783:

> "The legislature does not, of course, merely enact general policies. By the terms of a statute, it also indicates its conception of the sphere within which the policy is to have effect. In many cases the scope of a statute may reflect nothing more than the dimensions of the particular problem that came to the attention of the legislature, inviting the conclusion that

> the legislative policy is equally applicable to other situations in which the mischief is identical. * * *"

The mischief sought to be eliminated by the enactment of the Lands Act was the elimination of the absence of judicial redress for wrongful injuries and death sustained by those working on artificial islands in navigable waters off the coastal states of the nation. And to accomplish this the laws of the adjacent states were to be included as federal law where not inconsistent with applicable federal law. Applicable Louisiana law confers upon petitioners a cause of action against Penrod for the wrongful death of their son. Their claim is not one arising "under or through" their son. It is one which exists independently of any claim which their son might have under the Longshoremen's Act. Nowhere in the Longshoremen's Act is there any provision made for the claim asserted by petitioners. There exists therefore no applicable federal law. Applicable state law therefore cannot be ousted because as the court said in *Rodrigue*, "For federal law to oust adopted state law, federal law must first apply." 89 S.Ct. at P. 1839. As shown by the cases referred to in this application, the proscription of Section 905 does not constitute a bar to petitioners' cause of action. Applicable state law makes the wrongful death of petitioners' son an actionable tort and renders Penrod liable in damages.

Petitioners' position vis-a-vis the applicability of Section 905 is stronger than the positions of the litigants

involved in the cases reviewed. In the factual context of petitioners' claim, unlike the position of the employers in the cases reviewed, defendant Penrod has incurred no liability as contemplated by Section 904 as the result of the death of petitioners' son. This is true because petitioners' son left no dependents and, therefore, there is no one eligible for the benefits contemplated by Section 904. Thus the condition (liability under Section 904) which triggers the application of the exclusiveness of liability contained in 905 does not exist. Section 905 therefore is inapplicable. It can be made applicable only if the court is prepared to hold, as the lower courts implicitly held, that theoretical liability, as opposed to actual liability, under Section 904 is sufficient to excite the operation of Section 905, and that, notwithstanding the non-actual liability of the employer, the exclusiveness of longshoremen benefits liability of Section 905 insulates the employer from any other liability as to every one. Such an assessment of the operational effects of Section 905, however, is at variance with the rationale giving support to its existence, as authoritatively interpreted in *Ryan*.

The benefits inuring to the stevedore and the liability imposed upon the employer contained in the Longshoremen's Act are rooted in a quid pro quo equitable concept. The stevedore gets the benefits without having to sustain the burden of proving fault, in exchange for which the employer's liability is limited to the delimited benefits due to the stevedore. *Ryan*, supra. Said the court in speaking to the rationale of Section 905: (76 S.Ct. at P. 235)

> "The obvious purpose of this provision is to make the statutory liability of an employer to contribute to its employee's compensation the exclusive liability *of such employer to its employee, or to anyone* claiming under or through such employee, *on account of his injury or death arising out of that employment.* In return, the employee, and those claiming under or through him, are given a substantial *quid pro quo* in the form of an assured compensation, regardless of fault, as a substitute for their excluded claims. * * *"

The decisions of the court below have granted to Penrod the special privilege of limited liability — indeed the exceptionally special privilege of no liability. This special privilege has been granted Penrod while simultaneously denying petitioners of a quid pro quo in the form of an assured compensation, regardless of fault, as a substitute for their claim. In fact, petitioners have been granted nothing but denied of all.

Moreover, as the court instructs in *Ryan*, the proscription of Section 905 is limited to those parties "claiming under or through" the employee on account of his injury or death arising out of his employment. But as it has been demonstrated before, petitioners are not claiming "under or through" their deceased son. Their claim is conferred upon them directly and exclusively by Louisiana law.

None of the underpinning reasons supporting the purpose of Section 905 exists in connection with petition-

ers' claim. In fact there are four substantial reasons why Section 905 cannot be applied against petitioners. First, petitioners are not parents within the contemplation of Section 905. Second, their son left no dependents and therefore there is no one eligbile to receive the benefits provided for by Section 904. Consequently, Penrod has incurred no liability as prescribed by 904 and therefore the condition precedent to the operational effect of 905 does not exist. Third, petitioners' claim is not being made nor asserted "under or through" their son. And fourth, they enjoy no quid pro quo in the form of an assured compensation, regardless of fault, as a substitute for their claim. There can be, therefore, no legal justification for the application of the provisions of Section 905 against the claims asserted by petitioners. Consequently, the rulings of the court below must be reversed.

While *Hitaffer*, supra, was reversed by *Smither & Co., Inc. vs. Coles*, 242 F.2d 220, cert. denied, 77 S.Ct. 1299, that reversal leaves petitioners' cause of action unaffected. This is true primarily because the basis in *Smither* for the reversal of *Hitaffer* was the prior recovery of benefits due under 904 by the plaintiff's spouse.

The essential facts in *Smither* were that husband Cole was injured and received compensation under the Longshoremen's Act. His wife filed a suit for loss of consortium as the result of his injuries. In reversing an award made by the District Court, the Court of Appeals held: (242 F.2d 225)

> "* * * We need not decide, however, whether the right of one spouse to recover damages for loss of consortium is derivative or independent; under this statute, as indeed under the statutory scheme of such statutes everywhere all the rights of 'husband or wife' are merged into the exclusive remedy provided by the Act *and are barred by a recovery under the Act.* * * *"

In petitioners' case, however, no one has recovered any of the benefits due under 904. And no one is eligible to recover such benefits. Thus, employer Penrod has not and will not incur any liability prescribed by Section 904, and they therefore cannot insist on the exclusivity of Section 905.

The primary duty owed by Penrod to petitioners not to wrongfully kill their son already exists. The damage in the nature of the loss of society of their son already has been inflicted upon petitioners. Their cause of action against Penrod for the wrongful killing of their son already exists by virtue of applicable Louisiana law. What remains to be decided is, therefore, a remedial matter. The fact that Penrod's wrongful conduct may have inflicted two different harms to different people, is not a sufficient reason to withhold a remedy. Though in a different context this was the holding of the court in *Moragne vs. State Marine Lines, Inc.*, 398 U.S. 375, 90 S.Ct. 1772, 1778:

> "* * * Because the primary duty already exists, the decision whether to allow recovery

> for violations causing death is entirely a *remedial matter*. It is true that the harms to be assuaged are not identical in the two cases: in the case of mere injury, the person physically harmed is made whole for his harm, while in the case of death, those closest to him — usually spouse and children — seek to recover for their total loss of one on whom they depended. This difference, however, even when coupled with the practical difficulties of defining the class of beneficiaries who may recover for death, does not seem to account for the law's refusal to recognize a wrongful killing as an actionable tort. One expects, therefore, to find a persuasive, independent justification for this apparent legal anomaly."

Because defendant Penrod has incurred no liability to pay benefits prescribed by Section 904, if petitioners' right to recover damages on account of the death of their son is denied, the result will be the adoption of a notion of justice that has been characterized by this court as "barbarous." The denial of a remedy to petitioners would mean that compensation is due where wrongful conduct produces injury only, but denied when the wrongful conduct is serious enough to cause death. In speaking to this discredited principle, the court in *Moragne*, supra, said: (90 S.Ct. at P. 1778)

> "* * * Where existing law imposes a primary duty, violations of which are compensable if they cause injury, nothing in ordinary notions of justice suggests that a violation should

be nonactionable simply because it was serious enough to cause death. On the contrary, that rule has been criticized ever since its inception, and described in such terms as 'barbarous'. * * *"

CONCLUSION

The injuries sustained by the stevedore employees in *Ryan,* supra, *Weyerhaeuser vs. Nacirema,* supra, *Crumady,* supra, *Waterman,* supra, *Weyerhaeuser vs. United States,* supra, *Treadwell,* supra, and *Cooper Stevedoring Company, Inc.,* supra, were the cause and measure of the damage sustained by the claimants, for which the stevedoring employer was held liable. Death of the stevedoring employee in petitioners' case is the cause and measure of the damage sustained by petitioners, for which the stevedoring employer is liable. Thus, the source of the damage to claimants in these cases, including petitioners' case, is the same. The connexity between the injury or death of the stevedore employees and the damages sustained by the claimants, including petitioners, is the same. *Ryan,* et al, therefore, cannot be distinguished from petitioners' claim on the basis of the source of damage.

The origin of the duty owed to claimants and breached by the stevedoring employers in *Ryan, Weyerhaeuser vs. Nacirema, Crumady,* and *Waterman* was in contract. The origin of the duty owed to claimant and breached by the stevedoring employer in *Weyerhaeuser vs. United States* was in tort, secured by

a contribution concept rooted in ancient admiralty law. The origin of the duty owed to claimant and breached by the stevedoring employer in *Treadwell* was in tort, secured by a contribution concept rooted in common law. The origin of the duty owed to claimants and breached by the stevedoring employer in petitioners' case is in tort, secured by the mandatory provisions of Louisiana Civil Code, Article 2315, et seq. These decisions of the court in *Ryan*, et al, bear witness to the fact that the origin of duty, however diverse, is of no persuasive or decisive value in holding the stevedoring employer liable to the claimants involved. Petitioners' claim, therefore, cannot be distinguished from these cases on the basis of the origin of duty involved.

None of the claimants in *Ryan*, et al, was eligible for benefits under Section 904. Neither of the petitioners involved in this application for certiorari is eligible for benefits under Section 904. Petitioners' claim, therefore, cannot be distinguished from these cases on the basis of eligibility of the claimants under Section 904.

None of the claimants in *Ryan*, et al, asserted a claim "under or through" the stevedore employees. Neither of the petitioners in this application for certiorari assert a claim "under or through" the stevedore employee. Petitioners' claim, therefore, cannot be distinguished from these cases on that basis.

All of the claimants in *Ryan*, et al, necessarily are included within the term "anyone" contained in Sec-

tion 905, when the literal wording of the statute is given full sway. For the same reason, petitioners are likewise included. But Section 905 makes no difference between the terms "anyone" or "parents" or "next of kin," in speaking to those who are excluded from claiming anything more than the benefits of 904. There can, therefore, be no distinction between the claimants in *Ryan*, et al, and petitioners on the basis that one or the other is not included in Section 905. There exists, therefore, no difference between claimants in *Ryan*, et al, and petitioners herein.

The only difference which does exist relates to the commodity of damage and the extent of injury inflicted on the stevedore employees. Claimants in *Ryan*, et al, suffered the loss of money in consequence of injury to the stevedore employee. Petitioners suffered the loss of society of a loved one in consequence of the death of the stevedore employee. Claimants in *Ryan*, et al, sought and got redress for the monetary loss sustained in consequence of injury to the stevedore employee. Petitioners sought but have been denied redress for their loss of society of a loved one in consequence of the death of the stevedore employee. The denial to petitioners of redress necessarily must be based, if indeed there is a basis, upon the severity of the injury to the stevedore employee or upon the nature of the damages sustained by petitioners or both. If the denial is based upon the severity of the injury to the stevedore employee, then the decisions in the courts below stand for a notion of justice that grants redress for wrongful conduct causing injury, but denies redress for wrongful conduct causing death. If the de-

nial is based upon the nature of the damages sustained, then the decisions in the courts below stand for a notion of justice that grants redress for wrongful conduct causing loss of property, but denies redress for wrongful conduct causing the loss of the society of a loved one. One reason is as barbaric in concept as the other. Both are simply doubly barbaric.

There simply exists no reasonable distinction between claimants in *Ryan,* et al, and petitioners herein, that might be reasonably related to the purpose of the Longshoremen's Act so as to justify the grant of redress in *Ryan,* et al, and the denial of redress to petitioners. The denial to petitioners of the right of redress, therefore, amounts to an invidious discrimination against them. Constitutional equality proscribes such a result.

WHEREFORE petitioners respectfully pray that a writ of certiorari issue herein to the Court of Appeals, Fifth Circuit, and finally that the judgment appealed from be reversed and plaintiffs' claim be ordered remanded to the District Court for proceedings consistently with the decision of the court and applicable law.

Respectfully submitted,

J. MINOS SIMON
Attorney for Petitioners
1408 Pinhook Road
Post Office Box 52116 OCS
Lafayette, Louisiana 70501

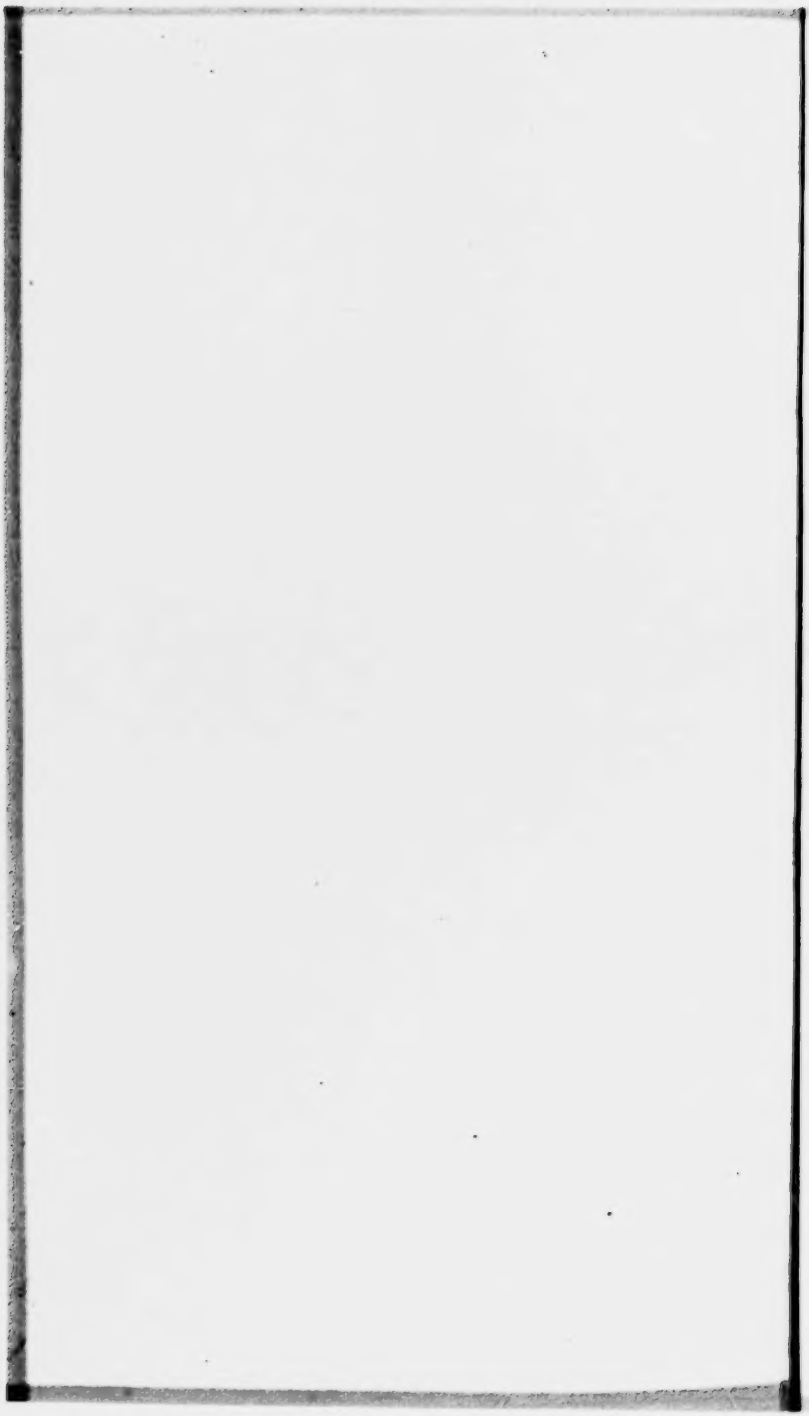
J. MINOS SIMON

PROOF OF SERVICE

I, J. Minos Simon, Attorney for Petitioners herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the ____ day of September, 1974, I served a copy of the foregoing Petition for Writ of Certiorari on Mr. Patrick A. Juneau, Jr., Attorney for Respondents, Post Office Box 3527, Lafayette, Louisiana 70501.

Lafayette, Louisiana, this ____ day of September, 1974.

J. MINOS SIMON



APPENDIX

SEP 5 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-241

MR. and MRS. MALVIN HENNIGAN, *Appellants*

versus

PLACID OIL COMPANY, ET AL, *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF LOUISIANA

J. MINOS SIMON
Attorney at Law
1408 Pinhook Road
Post Office Box 52116
Lafayette, Louisiana 70501

ATTORNEY FOR APPELLANTS

APPENDIX

I N D E X

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Per Curiam Opinion of
Court of Appeals for
the Fifth Circuit

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Longshoremen's and Harbor
Workers' Compensation Act
33 USC 901 - 951

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Outer Continental Shelf
Lands Act, 43 USC 1331,
1332 and 1333

APPENDIX A-1

PER CURIAM OPINION OF

COURT OF APPEALS

FOR THE FIFTH CIRCUIT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 74-1403
Summary Calendar*

MR. AND MRS. MALVIN HENNIGAN,
Plaintiffs-Appellants,

v.

PLACID OIL COMPANY, et al,
Defendants-Appellees

Appeal from the
United States District Court
for the Western District of Louisiana

(June 13, 1974)

Before WISDOM, GOLDBERG and GEE, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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*Rule 18, 5th Cir., Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al, 5th Cir., 1970, 431 F.2d 409, Part 1.

[1] See N.L.R.B. v. Amalgamated Clothing Workers of America, 5th Cir., 1970, 430 F.2d 966.

APPENDIX A - 2

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

33 USC 901 - 951

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

SHORT TITLE

33 USC § 901.

SEC. 1. This Act may be cited as "Longshoremen's and Harbor Workers' Compensation Act."

DEFINITIONS

33 USC § 902.

SEC. 2. When used in this Act—

(1) The term "person" means individual, partnership, corporation, or association.

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

(3) The term "employee" does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

(4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock).

(5) The term "carrier" means any person or fund authorized under section 32 to insure under this Act and includes self-insurers.

(6) The term "Secretary" means the Secretary of Labor.

(7) The term "deputy commissioner" means the deputy commissioner having jurisdiction in respect of an injury or death.

(8) The term "State" includes a Territory and the District of Columbia.

(9) The term "United States" when used in a geographical sense means the several States and Territories and the District of Columbia, including the territorial waters thereof.

(10) "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

(11) "Death" as a basis for a right to compensation means only death resulting from an injury.

(12) "Compensation" means the money allowance payable to an employee or to his dependents as provided for in this Act, and includes funeral benefits provided therein.

(13) "Wages" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer.

(14) "Child" shall include a posthumous child, a child legally adopted prior to the injury of the employee, a child in relation to whom the deceased employee stood in loco parentis for at least one year prior to the time of injury, and a stepchild or acknowledged illegitimate child dependent upon the deceased, but does not include married children unless wholly dependent on him. "Grandchild" means a child as above defined of a child as above defined. "Brother" and "sister" include stepbrothers and stepsisters, half brothers and half sisters, and brothers and sisters by adoption, but does not include married brothers nor married sisters unless wholly dependent on the employee. "Child," "grandchild," "brother," and "sister" include only persons who are under eighteen years of age, and also persons who, though eighteen years of age or over, are wholly dependent upon the deceased employee and incapable of self-support by reason of mental or physical disability.

(15) The term "parent" includes step-parents and parents by adoption, parents-in-law, and any person who for more than three years prior to the death of the deceased employee stood in the place of a parent to him, if dependent on the injured employee.

(16) The term "widow" includes only the decedent's wife living with or dependent for support upon him at the time of his death; or living apart for justifiable cause or by reason of his desertion at such time.

(17) The term "widower" includes only the decedent's husband who at the time of her death lived with her and was dependent for support upon her.

(18) The term "adoption" or "adopted" means legal adoption prior to the time of the injury.

(19) The singular includes the plural and the masculine includes the feminine and neuter.

COVERAGE

33 USC § 903

SEC. 3. (a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters

of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

(b) No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another.

LIABILITY FOR COMPENSATION

33 USC § 904.

SEC. 4. (a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 7, 8, and 9. In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment.

(b) Compensation shall be payable irrespective of fault as a cause for the injury.

EXCLUSIVENESS OF LIABILITY

33 USC § 905.

SEC. 5. The liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this Act, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee.

TIME FOR COMMENCEMENT OF COMPENSATION

MAXIMUM AND MINIMUM COMPENSATION

33 USC § 906.

SEC. 6. (a) No compensation shall be allowed for the first three days of the disability, except the benefits provided for in section 7: *Provided, however,* That in case the injury results in disability of more than twenty-eight days, the compensation shall be allowed from the date of the disability.

(b) Compensation for disability shall not exceed $70 per week and compensation for total disability shall not be less than $18 per week: *Provided, however,* That, if the employee's average weekly wages, as computed under section 10, are less than $18 per week, he shall receive as compensation for total disability his average weekly wages.

MEDICAL SERVICES AND SUPPLIES

33 USC § 907.

SEC. 7. (a) The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

(b) The employee shall have the right to choose an attending physician from a panel of physicians to be named by the employer subject to the provisions of subsection (c) of this section. If, due to the nature of the injury, the employee is unable to select his physician from a panel and the nature of the injury requires immediate medical treatment and care, the employer shall select a physician for him from the panel. Nothing contained in this section shall limit the right of the employee to make a second choice of physician from such panel. The deputy commissioner may, under rules prescribed by the Secretary, permit an injured employee to select a physician not on the panel when specialized services are needed or in unusual circumstances. The deputy commissioner shall have authority to determine the necessity, character, and sufficiency of any medical aid furnished or to be furnished and shall have authority to order a change of physicians or hospitals when in his judgment such change is desirable or necessary.

(c) The deputy commissioner shall approve the qualifications of the panel of physicians named by the employer and shall determine the number of physicians to be named. In determining the size of the panel, he shall take into account the number of competent, suitable, and impartial physicians conveniently available to the community in which the medical service is required. Every employer shall post the names and addresses of the physicians on his panel in such manner as to afford his employees reasonable notice thereof.

(d) If the employer fails to provide the medical or other treatment, services, and supplies required to be furnished by subsection (a), after request by the injured employee, or fails to maintain a panel of physicians as required by subsection (c), or fails to permit the employee to choose an attending physician from such panel, such injured employee may procure such medical or other treatment, services, and supplies and select a physician to render treatment and services at the expense of the employer. The employee shall not be entitled to recover any amount expended by him for such treatment or services unless he shall have requested the employer to furnish the same and the employer shall have refused or neglected to do so, or unless the nature of the injury required such treatment and services and the employer or his superintendent or foreman having knowledge of such injury shall have neglected to provide the same; nor shall any claim for medical or surgical treatment be valid and enforceable, as against such employer, unless within twenty days following the first treatment the physician giving such treatment furnish to the employer and the deputy commissioner a report of such injury and treatment, on a form prescribed by the Secretary. The deputy commissioner may, however, excuse the failure to furnish such report within twenty days when he finds it to be in the interest of justice to do so, and he may, upon application by a party in interest, make an award for the reasonable value of such medical or surgical treatment so obtained by the employee. If at any time during such period the employee unreasonably refuses to submit to medical or surgical treatment, the deputy commissioner may, by order, suspend the payment of further compensation during such time as such refusal continues, and no compensation shall be paid at any time during the period of such suspension, unless the circumstances justified the refusal.

(e) Whenever in the opinion of the deputy commissioner a physician has not impartially estimated the degree of permanent disability or the extent of temporary disability of any injured employee, the deputy commissioner shall have the power to cause such employee to be examined by a physician selected by the deputy commissioner and to obtain from such physician a report containing his estimate of such disabilities. If the report of such physician shows that the estimate of the physician has not been impartial from the standpoint of such employee, the deputy commissioner shall have the power in his discretion to charge the cost of such examination to the employer, if he is a self-insurer, or to the insurance company which is carrying the risk.

(f) All fees and other charges for such treatment or service shall be limited to such charges as prevail in the same community for similar treatment of injured persons of like standard of living, and shall be subject to regulation by the deputy commissioner.

(g) The liability of an employer for medical treatment as herein

provided shall not be affected by the fact that his employee was injured through the fault or negligence of a third party not in the same employ, or suit has been brought against such third party. The employer shall, however, have a cause of action against such third party to recover any amounts paid by him for such medical treatment in like manner as provided in section 33(b) of this Act.

COMPENSATION FOR DISABILITY

33 USC § 908.

SEC. 8. Compensation for disability shall be paid to the employee as follows:

(a) Permanent total disability: In case of total disability adjudged to be permanent 66⅔ per centum of the average weekly wages shall be paid to the employee during the continuance of such total disability. Loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof shall, in the absence of conclusive proof to the contrary, constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

(b) Temporary total disability: In case of disability total in character but temporary in quality 66⅔ per centum of the average weekly wages shall be paid to the employee during the continuance thereof.

(c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66⅔ per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subdivision (b) or subdivision (e) of this section respectively and shall be paid to the employee, as follows:

(1) Arm lost, three hundred and twelve weeks' compensation.
(2) Leg lost, two hundred and eighty-eight weeks' compensation.
(3) Hand lost, two hundred and forty-four weeks' compensation.
(4) Foot lost, two hundred and five weeks' compensation.
(5) Eye lost, one hundred and sixty weeks' compensation.
(6) Thumb lost, seventy-five weeks' compensation.
(7) First finger lost, forty-six weeks' compensation.
(8) Great toe lost, thirty-eight weeks' compensation.
(9) Second finger lost, thirty weeks' compensation.
(10) Third finger lost, twenty-five weeks' compensation.
(11) Toe other than great toe lost, sixteen weeks' compensation.
(12) Fourth finger lost, fifteen weeks' compensation.
(13) Loss of hearing: Compensation for loss of hearing of one ear, fifty-two weeks. Compensation for loss of hearing of both ears, two hundred weeks.
(14) Phalanges: Compensation for loss of more than one phalange

of a digit shall be the same as for loss of the entire digit. Compensation for loss of the first phalange shall be one-half of the compensation for loss of the entire digit.

(15) Amputated arm or leg: Compensation for an arm or a leg, if amputated at or above the elbow or the knee, shall be the same as for a loss of the arm or leg; but, if amputated between the elbow and the wrist or the knee and the ankle, shall be the same as for loss of a hand or foot.

(16) Binocular vision or per centum of vision: Compensation for loss of binocular vision or for 80 per centum or more of the vision of an eye shall be the same as for loss of the eye.

(17) Two or more digits: Compensation for loss of two or more digits or one or more phalanges of two or more digits, of a hand or foot may be proportioned to the loss of use of the hand or foot occasioned thereby, but shall not exceed the compensation for loss of a hand or foot.

(18) Total loss of use: Compensation for permanent total loss of use of a member shall be the same as for loss of the member.

(19) Partial loss or partial loss of use: Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member.

(20) Disfigurement: The deputy commissioner shall award proper and equitable compensation for serious facial or head disfigurement, not to exceed $3,500.

(21) Other cases: In all other cases in this class of disability the compensation shall be 66⅔ per centum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability, but subject to reconsideration of the degree of such impairment by the deputy commissioner on his own motion or upon application of any party in interest.

(22) In any case in which there shall be a loss of, or loss of use of more than one member or parts of more than one member set forth in paragraphs (1) to (19) of this subdivision, not amounting to permanent total disability, the award of compensation shall be for the loss of, or loss of use of, each such member or part thereof, which awards shall run consecutively, except that where the injury affects only two or more digits of the same hand or foot, paragraph (17) of this subdivision shall apply.

(d) Any compensation to which any claimant would be entitled under subdivision (c) excepting subdivision (c-21) shall, notwithstanding death arising from causes other than the injury, be payable to and for the benefit of the persons following:

(1) If there be a surviving wife or dependent husband and no child

of the deceased under the age of eighteen years, to such wife or dependent husband.

(2) If there be a surviving wife or dependent husband and surviving child or children of the deceased under the age of eighteen years, one-half shall be payable to the surviving wife or dependent husband and the other half to the surviving child or children.

(3) The deputy commissioner may in his discretion require the appointment of a guardian for the purpose of receiving the compensation of the minor child. In the absence of such a requirement the appointment for such a purpose shall not be necessary.

(4) If there be a surviving child or children of the deceased under the age of eighteen years, but no surviving wife or dependent husband, then to such child or children.

(5) An award for disability may be made after the death of the injured employee.

(e) Temporary partial disability: In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be two-thirds of the difference between the injured employee's average weekly wages before the injury and his wage-earning capacity after the injury in the same or another employment, to be paid during the continuance of such disability, but shall not be paid for a period exceeding five years.

(f) Injury increasing disability: (1) If an employee receives an injury which of itself would only cause permanent partial disability but which, combined with a previous disability, does in fact cause permanent total disability, the employer shall provide compensation only for the disability caused by the subsequent injury: *Provided, however,* That in addition to compensation for such permanent partial disability, and after the cessation of the payments for the prescribed period of weeks, the employee shall be paid the remainder of the compensation that would be due for permanent total disability. Such additional compensation shall be paid out of the special fund established in section 44.

(2) In all other cases in which, following a previous disability, an employee receives an injury which is not covered by (1) of this subdivision, the employer shall provide compensation only for the disability caused by the subsequent injury. In determining compensation for the subsequent injury or for death resulting therefrom, the average weekly wages shall be such sum as will reasonably represent the earning capacity of the employee at the time of the subsequent injury.

(g) Maintenance for employees undergoing vocational rehabilitation: An employee who as a result of injury is or may be expected to be totally or partially incapacitated for a remunerative occupation and who, under the direction of the Secretary as provided by section 39 (c) of this Act, is being rendered fit to engage in a remunerative

occupation, shall receive additional compensation necessary for his maintenance, but such additional compensation shall not exceed $25 a week. The expense shall be paid out of the special fund established in section 44.

(h) The wage-earning capacity of an injured employee in cases of partial disability under subdivisions (c) (21) of this section or under subdivision (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: *Provided, however,* That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

(i) In cases under subdivision (c)(21) and subdivision (e) of this section, whenever the deputy commissioner determines that it is for the best interests of an injured employee entitled to compensation, he may, with the approval of the Secretary, approve agreed settlements of the interested parties, discharging the liability of the employer for such compensation, notwithstanding the provisions of section 15(b) and section 16 of this Act: *Provided,* That the sum so agreed upon shall be payable in installments as provided in section 14(b), which installments shall be subject to commutation under section 14(j); *And provided further,* That if the employee should die from causes other than the injury after the Secretary has approved an agreed settlement as provided for herein, the sum so approved shall be payable, in the manner prescribed in this subdivision, to and for the benefit of the persons enumerated in subdivision (d) of this section.

COMPENSATION FOR DEATH

33 USC § 909.

SEC. 9. If the injury causes death, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:

(a) Reasonable funeral expenses not exceeding $400.

(b) If there be a surviving wife or dependent husband and no child of the deceased to such surviving wife or dependent husband 35 per centum of the average wages of the deceased, during widowhood, or dependent widowerhood, with two years' compensation in one sum upon remarriage; and if there be a surviving child or children of the deceased, the additional amount of 15 per centum of such wages for each child; in the case of the death or remarriage of such surviving

wife or dependent husband, if there be one surviving child of the deceased employee, such child shall have his compensation increased to 35 per centum of such wages, and if there be more than one surviving child of the deceased employee, to such children, in equal parts, 35 per centum of such wages increased by 15 per centum of such wages for each child in excess of one:

Provided, That the total amount payable shall in no case exceed 66⅔ per centum of such wages. The deputy commissioner having jurisdiction over the claim may, in his discretion, require the appointment of a guardian for the purpose of receiving the compensation of a minor child. In the absence of such a requirement the appointment of a guardian for such purposes shall not be necessary.

(c) If there be one surviving child of the deceased, but no surviving wife or dependent husband, then for the support of such child 35 per centum of the wages of the deceased; and if there be more than one surviving child of the deceased, but no widow or dependent husband, then for the support of such children, in equal parts 35 per centum of such wages increased by 15 per centum of such wages for each child in excess of one: *Provided,* That the total amount payable shall in no case exceed 66⅔ per centum of such wages.

(d) If there be no surviving wife or dependent husband or child or if the amount payable to a surviving wife or dependent husband and to children shall be less in the aggregate than 66⅔ per centum of the average wages of the deceased; then for the support of grandchildren or brothers and sisters, if dependent upon the deceased at the time of the injury, 15 per centum of such wages for the support of each such person and for the support of each parent, or grandparent, of the deceased if dependent upon him at the time of the injury, 25 per centum of such wages during such dependency. But in no case shall the aggregate amount payable under this subdivision exceed the difference between 66⅔ per centum of such wages and the amount payable as hereinbefore provided to surviving wife or dependent husband and for the support of surviving child or children.

(e) In computing death benefits the average weekly wages of the deceased shall be considered to have been not more than $105 nor less than $27 but the total weekly compensation shall not exceed the weekly wages of the deceased.

(f) All questions of dependency shall be determined as of the time of the injury.

(g) Aliens: Compensation under this chapter to aliens not residents (or about to become nonresidents) of the United States or Canada shall be the same in amount as provided for residents, except that dependents in any foreign country shall be limited to surviving wife and child or children, or if there be no surviving wife or child or children, to surviving father or mother whom the employee

has supported, either wholly or in part, for the period of one year prior to the date of the injury, and except that the Secretary may, at his option or upon the application of the insurance carrier shall, commute all future installments of compensation to be paid to such aliens by paying or causing to be paid to them one-half of the commuted amount of such future installments of compensation as determined by the Secretary.

DETERMINATION OF PAY

33 USC § 910.

SEC. 10. Except as otherwise provided in this Act, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined as follows:

(a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

(b) If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earning if a six-day worker, shall consist of three hundred times the average daily wage or salary and, if a five-day worker, two hundred and sixty times the average daily wage or salary, which an employee of the same class working substantially the whole of such immediately preceding year in the same or in similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed.

(c) If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

(d) The average weekly wages of an employee shall be one fifty-second part of his average annual earnings.

(e) If it be established that the injured employee was a minor when

injured, and that under normal conditions his wages should be expected to increase during the period of disability the fact may be considered in arriving at his average weekly wages.

GUARDIAN FOR MINOR OR INCOMPETENT

33 USC § 911.

SEC. 11. The deputy commissioner may require the appointment by a court of competent jurisdiction, for any person who is mentally incompetent or a minor, of a guardian or other representative to receive compensation payable to such person under this Act and to exercise the powers granted to or to perform the duties required of such person under this Act.

NOTICE OF INJURY OR DEATH

33 USC § 912.

SEC. 12. (a) Notice of an injury or death in respect of which compensation is payable under this Act shall be given within thirty days after the date of such injury or death (1) to the deputy commissioner in the compensation district in which such injury occurred and (2) to the employer.

(b) Such notice shall be in writing, shall contain the name and address of the employee and a statement of the time, place, nature, and cause of the injury or death, and shall be signed by the employee or by some person on his behalf, or in case of death, by any person claiming to be entitled to compensation for such death or by a person on his behalf.

(c) Notice shall be given to the deputy commissioner by delivering it to him or sending it by mail addressed to his office, and to the employer by delivering it to him or by sending it by mail addressed to him at his last known place of business. If the employer is a partnership, such notice may be given to any partner, or if a corporation, such notice may be given to any agent or officer thereof upon whom legal process may be served or who is in charge of the business in the place where the injury occurred.

(d) Failure to give such notice shall not bar any claim under this Act (1) if the employer (or his agent in charge of the business in the place where the injury occurred) or the carrier had knowledge of the injury or death and the deputy commissioner determines that the employer or carrier has not been prejudiced by failure to give such notice, or (2) if the deputy commissioner excuses such failure on the ground that for some satisfactory reason such notice could not be given; nor unless objection to such failure is raised before the deputy commissioner at the first hearing of a claim for compensation in respect of such injury or death.

TIME FOR FILING OF CLAIMS

33 USC § 913.

SEC. 13. (a) The right to compensation for disability under this Act shall be barred unless a claim therefor is filed within one year after the injury, and the right to compensation for death shall be barred unless a claim therefor is filed within one year after the death, except that if payment of compensation has been made without an award on account of such injury or death a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or such death occurred.

(b) Notwithstanding the provisions of subdivision (a) failure to file a claim within the period prescribed in such subdivision shall not be a bar to such right unless objection to such failure is made at the first hearing of such claim in which all parties in interest are given reasonable notice and opportunity to be heard.

(c) If a person who is entitled to compensation under this Act is mentally incompetent or a minor, the provisions of subdivision (a) shall not be applicable so long as such person has no guardian or other authorized representative, but shall be applicable in the case of a person who is mentally incompetent or a minor from the date of appointment of such guardian or other representative, or in the case of a minor, if no guardian is appointed before he becomes of age, from the date he becomes of age.

(d) Where recovery is denied to any person, in a suit brought at law or in admiralty to recover damages in respect of injury or death, on the ground that such person was an employee and that the defendant was an employer within the meaning of this Act and that such employer had secured compensation to such employee under this Act, the limitation of time prescribed in subdivision (a) shall begin to run only from the date of termination of such suit.

PAYMENT OF COMPENSATION

33 USC § 914.

SEC. 14. (a) Compensation under this Act shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer.

(b) The first installment of compensation shall become due on the fourteenth day after the employer has knowledge of the injury or death, on which date all compensation then due shall be paid. Thereafter compensation shall be paid in installments, semimonthly, except where the deputy commissioner determines that payment in installments should be made monthly or at some other period.

(c) Upon making the first payment, and upon suspension of payment for any cause, the employer shall immediately notify the deputy commissioner, in accordance with a form prescribed by the Secretary, that payment of compensation has begun or has been suspended, as the case may be.

(d) If the employer controverts the right to compensation he shall file with the deputy commissioner on or before the fourteenth day after he has knowledge of the alleged injury or death, a notice, in accordance with a form prescribed by the Secretary, stating that the right to compensation is controverted, the name of the claimant, the name of the employer, the date of the alleged injury or death, and the grounds upon which the right to compensation is controverted.

(e) If any installment of compensation payable without an award is not paid within fourteen days after it becomes due, as provided in subdivision (b) of this section, there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subdivision (d) of this section, or unless such nonpayment is excused by the deputy commissioner after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

(f) If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 per centum thereof, which shall be paid at the same time as, but in addition to, such compensation, unless review of the compensation order making such award is had as provided in section 21 and an interlocutory injunction staying payments is allowed by the court as provided therein.

(g) Within sixteen days after final payment of compensation has been made, the employer shall send to the deputy commissioner a notice, in accordance with a form prescribed by the Secretary, stating that such final payment has been made, the total amount of compensation paid, the name of the employee and of any other person to whom compensation has been paid, the date of the injury or death, and the date to which compensation has been paid. If the employer fails to so notify the deputy commissioner within such time the Secretary shall assess against such employer a civil penalty in the amount of $100.

(h) The deputy commissioner (1) may upon his own initiative at any time in a case in which payments are being made without an award, and (2) shall in any case where right to compensation is controverted, or where payments of compensation have been stopped or suspended, upon receipt of notice from any person entitled to com-

pensation, or from the employer, that the right to compensation is controverted, or that payments of compensation have been stopped or suspended, make such investigations, cause such medical examinations to be made, or hold such hearings, and take such further action as he considers will properly protect the rights of all parties.

(i) Whenever the deputy commissioner deems it advisable he may require any employer to make a deposit with the Treasurer of the United States to secure the prompt and convenient payment of such compensation, and payments therefrom upon any awards shall be made upon order of the deputy commissioner.

(j) Whenever the deputy commissioner determines that it is in the interest of justice, the liability of the employer for compensation, or any part thereof as determined by the deputy commissioner with the approval of the Secretary, may be discharged by the payment of a lump sum equal to the present value of future compensation payments commuted, computed at 4 per centum true discount compounded annually. The probability of the death of the injured employee or other person entitled to compensation before the expiration of the period during which he is entitled to compensation shall be determined in accordance with the American Experience Table of Mortality, and the probability of the remarriage of the surviving wife shall be determined in accordance with the remarriage tables of the Dutch Royal Insurance Institution. The probability of the happening of any other contingency affecting the amount or duration of the compensation shall be disregarded.

(k) If the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due.

(l) An injured employee or in case of death his dependents or personal representative, shall give receipts for payment of compensation to the employer paying the same and such employer shall produce the same for inspection by the deputy commissioner, whenever required.

(m) The total money allowance payable to an employee as compensation for an injury under this Act shall in no event exceed in the aggregate the sum of $24,000: *Provided*, That this limitation shall not apply to cases of permanent total disability or death: *And provided further*, That in applying this limitation there shall not be taken into account any amount payable under section 8(g) of this title for maintenance during rehabilitation or any amount of additional compensation required to be paid under this section for delay or default in the payment of compensation or any amount accruing as interest upon defaulted compensation collectible under section 18.

INVALID AGREEMENTS

33 USC § 915.

SEC. 15. (a) No agreement by an employee to pay any portion of premium paid by his employer to a carrier or to contribute to a benefit fund or department maintained by such employer for the purpose of providing compensation or medical services and supplies as required by this Act shall be valid, and any employer who makes a deduction for such purpose from the pay of any employee entitled to the benefits of this Act shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than $1,000.

(b) No agreement by an employee to waive his right to compensation under this Act shall be valid.

ASSIGNMENT AND EXEMPTION FROM CLAIMS OF CREDITORS

33 USC § 916.

SEC. 16. No assignment, release, or commutation of compensation or benefits due or payable under this Act, except as provided by this Act, shall be valid, and such compensation and benefits shall be exempt from all claims of creditors and from levy, execution, and attachment or other remedy for recovery or collection of a debt, which exemption may not be waived.

COMPENSATION A LIEN AGAINST ASSETS

33 USC § 917.

SEC. 17. Any person entitled to compensation under the provisions of this Act shall have a lien against the assets of the carrier or employer for such compensation without limit of amount, and shall, upon insolvency, bankruptcy, or reorganization in bankruptcy proceedings of the carrier or employer, or both, be entitled to preference and priority in the distribution of the assets of such carrier or employer, or both.

DEFAULTED PAYMENTS

33 USC § 918.

SEC. 18. (a) In case of default by the employer in the payment of compensation due under any award of compensation for a period of thirty days after the compensation is due and payable, the person to whom such compensation is payable may, within one year after such default, make application to the deputy commissioner making the compensation order or[1] a supplementary order declaring the amount of the default. After investigation, notice, and hearing, as provided in section 19, the deputy commissioner shall make a supplementary order, declaring the amount of the default, which shall be filed in the

[1] The word "or" probably should read "for."

same manner as the compensation order. In case the payment in default is an installment of the award, the deputy commissioner may, in his discretion, declare the whole of the award as the amount in default. The applicant may file a certified copy of such supplementary order with the clerk of the Federal district court for the judicial district in which the employer has his principal place of business or maintains an office, or for the judicial district in which the injury occurred. In case such principal place of business or office or place where the injury occurred is in the District of Columbia, a copy of such supplementary order may be filed with the clerk of the United States District Court for the District of Columbia. Such supplementary order of the deputy commissioner shall be final, and the court shall upon the filing of the copy enter judgment for the amount declared in default by the supplementary order if such supplementary order is in accordance with law. Review of the judgment so entered may be had as in civil suits for damages at common law. Final proceedings to execute the judgment may be had by writ of execution in the form used by the court in suits at common law in actions of assumpsit. No fee shall be required for filing the supplementary order nor for entry of judgment thereon, and the applicant shall not be liable for costs in a proceeding for review of the judgment unless the court shall otherwise direct. The court shall modify such judgment to conform to any later compensation order upon presentation of a certified copy thereof to the court.

(b) In cases where judgment cannot be satisfied by reason of the employer's insolvency or other circumstances precluding payment, the Secretary of Labor may, in his discretion and to the extent he shall determine advisable after consideration of current commitments payable from the special fund established in section 44, make payment from such fund upon any award made under this Act, and in addition, provide any necessary medical, surgical, and other treatment required by section 7 of the Act in any case of disability where there has been a default in furnishing medical treatment by reason of the insolvency of the employer. Such an employer shall be liable for payment into such fund of the amounts paid therefrom by the Secretary of Labor under this subsection; and for the purpose of enforcing this liability, the Secretary of Labor for the benefit of the fund shall be subrogated to all the rights of the person receiving such payment or benefits, including the right of lien and priority provided for by section 17 of this Act, as against the employer and may by a proceeding in the name of the Secretary of Labor under section 18 or under subsection (c) of section 21 of this Act, or both, seek to recover the amount of the default or so much thereof as in the judgment of the Secretary is possible, or the Secretary may settle and compromise any such claim.

PROCEDURE IN RESPECT OF CLAIMS

33 USC § 919.

SEC. 19. (a) Subject to the provisions of section 13 a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the Secretary at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

(b) Within ten days after such claim is filed the deputy commissioner, in accordance with regulations prescribed by the Secretary, shall notify the employer and any other person (other than the claimant), whom the deputy commissioner considers an interested party, that a claim has been filed. Such notice may be served personally upon the employer or other person, or sent to such employer or person by registered mail.

(c) The deputy commissioner shall make or cause to be made such investigations as he considers necessary in respect of the claim, and upon application of any interested party shall order a hearing thereon. If a hearing on such claim is ordered the deputy commissioner shall give the claimant and other interested parties at least ten days' notice of such hearing, served personally upon the claimant and other interested parties or sent to such claimant and other interested parties by registered mail or by certified mail, and shall within twenty days after such hearing is had, by order, reject the claim or make an award in respect of the claim. If no hearing is ordered within twenty days after notice is given as provided in subdivision (b), the deputy commissioner shall, by order reject the claim or make an award in respect of the claim.

(d) At such hearing the claimant and the employer may each present evidence in respect of such claim and may be represented by any person authorized in writing for such purpose.

(e) The order rejecting the claim or making the award (referred to in this Act as a compensation order) shall be filed in the office of the deputy commissioner, and a copy thereof shall be sent by registered mail or by certified mail to the claimant and to the employer at the last known address of each.

(f) An award of compensation for disability may be made after the death of an injured employee.

(g) At any time after a claim has been filed with him, the deputy commissioner may, with the approval of the Secretary, transfer such case to any other deputy commissioner for the purpose of making investigation, taking testimony, making physical examinations or taking such other necessary action therein as may be directed.

(h) An injured employee claiming or entitled to compensation shall submit to such physical examination by a medical officer of

the United States or by a duly qualified physician designated or approved by the Secretary as the deputy commissioner may require. The place or places shall be reasonably convenient for the employee. Such physician or physicians as the employee, employer, or carrier may select and pay for may participate in an examination if the employee, employer, or carrier so requests. Proceedings shall be suspended and no compensation be payable for any period during which the employee may refuse to submit to examination.

PRESUMPTIONS

33 USC § 920.

SEC. 20. In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this Act.

(b) That sufficient notice of such claim has been given.

(c) That the injury was not occasioned solely by the intoxication of the injured employee.

(d) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another.

REVIEW OF COMPENSATION ORDER

33 USC § 921.

SEC. 21. (a) A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 19, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the United States District Court for the District of Columbia if the injury occurred in the District). The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless upon application for an interlocutory injunction the court, on hearing, after not less than three days' notice to the parties in interest and the deputy commissioner, allows the stay of such payments, in whole or in part, where irreparable damage would otherwise ensue to the employer. The order of the court allowing any such stay shall contain a specific finding, based upon evidence submitted to the court and identified

by reference thereto, that such irreparable damage would result to the employer, and specifying the nature of the damage.

(c) If any employer or his officers or agents fails to comply with a compensation order making an award, that has become final, any beneficiary of such award or the deputy commissioner making the order, may apply for the enforcement of the order to the Federal district court for the judicial district in which the injury occurred (or to the United States District Court for the District of Columbia if the injury occurred in the District). If the court determines that the order was made and served in accordance with law, and that such employer or his officers or agents have failed to comply therewith, the court shall enforce obedience to the order by writ of injunction or by other proper process, mandatory or otherwise, to enjoin upon such person and his officers and agents compliance with the order.

(d) Proceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, shall not be instituted otherwise than as provided in this section and section 18.

APPEARANCE OF UNITED STATES ATTORNEY FOR SECRETARY OF LABOR OR DEPUTY COMMISSIONER

33 USC § 921a.

SEC. 21a. In any court proceedings under section 21 or other provisions of the Longshoremen's and Harbor Workers' Compensation Act, it shall be the duty of the United States attorney in the judicial district in which the case is pending to appear as attorney or counsel on behalf of the Secretary of Labor or his deputy commissioner when either is a party to the case or interested, and to represent such Secretary or deputy in any court in which such case may be carried on appeal.

MODIFICATION OF AWARDS

33 USC § 922.

SEC. 22. Upon his own initiative, or upon the application of any party in interest, on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim review a compensation case in accordance with the procedure prescribed in respect of claims in section 19, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award in-

creasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with the approval of the Secretary.

PROCEDURE BEFORE THE DEPUTY COMMISSIONER

33 USC § 923.

SEC. 23. (a) In making an investigation or inquiry or conducting a hearing the deputy commissioner shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this Act; but may make such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties. Declarations of a deceased employee concerning the injury in respect of which the investigation or inquiry is being made or the hearing conducted shall be received in evidence and shall, if corroborated by other evidence, be sufficient to establish the injury.

(b) Hearings before a deputy commissioner shall be open to the public and shall be stenographically reported, and the deputy commissioners, subject to the approval of the Secretary, are authorized to contract for the reporting of such hearings. The Secretary shall by regulation provide for the preparation of a record of the hearings and other proceedings before the deputy commissioners.

WITNESSES

33 USC § 924.

SEC. 24. No person shall be required to attend as a witness in any proceeding before a deputy commissioner at a place outside of the State of his residence and more than one hundred miles from his place of residence, unless his lawful mileage and fee for one day's attendance shall be first paid or tendered to him; but the testimony of any witness may be taken by deposition or interrogatories according to the rules of practice of the Federal district court for the judicial district in which the case is pending (or of the United States District Court for the District of Columbia if the case is pending in the District).

WITNESS FEES

33 USC § 925.

SEC. 25. Witnesses summoned in a proceeding before a deputy commissioner or whose depositions are taken shall receive the same fees and mileage as witnesses in courts of the United States.

COSTS IN PROCEEDINGS BROUGHT WITHOUT REASONABLE GROUNDS

33 USC § 926.

SEC. 26. If the court having jurisdiction of proceedings in respect of any claim or compensation order determines that the proceedings in respect of such claim or order have been instituted or continued without reasonable ground, the costs of such proceedings shall be assessed against the party who has so instituted or continued such proceedings.

POWERS OF DEPUTY COMMISSIONERS

33 USC § 927.

SEC. 27. (a) The deputy commissioner shall have power to preserve and enforce order during any such proceedings; to issue subpoenas for, to administer oaths to, and to compel the attendance and testimony of witnesses, or the production of books, papers, documents, and other evidence, or the taking, of depositions before any designated individual competent to administer oaths; to examine witnesses; and to do all things conformable to law which may be necessary to enable him effectively to discharge the duties of his office.

(b) If any person in proceedings before a deputy commissioner disobeys or resists any lawful order or process, or misbehaves during a hearing or so near the place thereof as to obstruct the same, or neglects to produce, after having been ordered to do so, any pertinent book, paper, or document, or refuses to appear after having been subpoenaed, or upon appearing refuses to take the oath as a witness, or after having taken the oath refuses to be examined according to law, the deputy commissioner shall certify the facts to the district court having jurisdiction in the place in which he is sitting (or to the United States District Court for the District of Columbia if he is sitting in such District) which shall thereupon in a summary manner hear the evidence as to the acts complained of, and, if the evidence so warrants, punish such person in the same manner and to the same extent as for a contempt committed before the court, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of or in the presence of the court.

FEES FOR SERVICES

33 USC § 928.

SEC. 28. (a) No claim for legal services or for any other services rendered in respect of a claim or award for compensation, to or on account of any person, shall be valid unless approved by the deputy commissioner, or if proceedings for review of the order of the deputy commissioner in respect of such claim or award are had before any court, unless approved by such court. Any claim so approved shall,

in the manner and to the extent fixed by the deputy commissioner or such court, be a lien upon such compensation.

(b) Any person (1) who receives any fee, other consideration, or any gratuity on account of services so rendered, unless such consideration or gratuity is approved by the deputy commissioner or such court, or (2) who makes it a business to solicit employment for a lawyer or for himself in respect of any claim or award for compensation, shall be guilty of a misdemeanor, and upon conviction thereof, shall, for each offense, be punished by a fine of not more than $1,000 or by imprisonment not to exceed one year, or by both such fine and imprisonment.

RECORD OF INJURY OR DEATH

33 USC § 929.

SEC. 29. Every employer shall keep a record in respect of any injury to an employee. Such record shall contain such information of disease, other disability, or death in respect of such injury as the Secretary may by regulation require, and shall be available to inspection by the Secretary or by any State authority as such times and under such conditions as the Secretary may by regulation prescribe.

REPORTS

33 USC § 930.

SEC. 30. (a) Within ten days from the date of any injury or death or from the date that the employer has knowledge of a disease or infection in respect of such injury, the employer shall send to the Secretary a report setting forth (1) the name, address, and business of the employer; (2) the name, address, and occupation of the employee; (3) the cause and nature of the injury or death; (4) the year, month, day, and hour when and the particular locality where the injury or death occurred; and (5) such other information as the Secretary may require. A copy of such report shall be sent at the same time to the deputy commissioner in the compensation district in which the injury occurred.

(b) Additional reports in respect of such injury and of the condition of such employee shall be sent by the employer to the Secretary and to such deputy commissioner at such times and in such manner as the Secretary may prescribe.

(c) Any report provided for in subdivision (a) or (b) shall not be evidence of any fact stated in such report in any proceeding in respect of any such injury or death on account of which the report is made.

(d) The mailing of any such report and copy in a stamped envelope, within the time prescribed in subdivisions (a) or (b), to the Secretary and deputy commissioner, respectively, shall be a compliance with this section.

(e) Any employer who fails or refuses to send any report required of him by this section shall be subject to a civil penalty not to exceed $500 for each such failure or refusal.

(f) Where the employer or the carrier has been given notice, or the employer (or his agent in charge of the business in the place where the injury occurred) or the carrier has knowledge, of any injury or death of an employee and fails, neglects, or refuses to file report thereof as required by the provisions of subdivision (a) of this section, the limitations in subdivision (a) of section 13 of this Act shall not begin to run against the claim of the injured employee or his dependents entitled to compensation, or in favor of either the employer or the carrier, until such report shall have been furnished as required by the provisions of subdivision (a) of this section.

PENALTY FOR MISREPRESENTATION

33 USC § 931.

SEC. 31. Any person who willfully makes any false or misleading statement or representation for the purpose of obtaining any benefit or payment under this Act shall be guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not to exceed $1,000 or by imprisonment of not to exceed one year, or by both such fine and imprisonment.

SECURITY FOR COMPENSATION

33 USC § 932.

SEC. 32. (a) Every employer shall secure the payment of compensation under this Act—

(1) By insuring and keeping insured the payment of such compensation with any stock company or mutual company or association, or with any other person or fund, while such person or fund is authorized

(A) under the laws of the United States or of any State, to insure workmen's compensation, and (B) by the Secretary, to insure payment of compensation under this Act; or

(2) By furnishing satisfactory proof to the Secretary of his financial ability to pay such compensation and receiving an authorization from the Secretary to pay such compensation directly. The Secretary may, as a condition to such authorization, require such employer to deposit in a depository designated by the Secretary either an indemnity bond or securities (at the option of the employer) of a kind and in an amount determined by the Secretary, and subject to such conditions as the Secretary may prescribe, which shall include authorization to the Secretary in case of default to sell any such securities sufficient to pay compensation awards or to bring suit upon such bonds, to procure prompt payment of compensation under this Act.

Any employer securing compensation in accordance with the provisions of this paragraph shall be known as a self-insurer.

(b) In granting authorizaton to any carrier to insure payment of compensation under this Act the Secretary may take into consideration the recommendation of any State authority having supervision over carriers or over workmen's compensation, and may authorize any carrier to insure the payment of compensation under this Act in a limited territory. Any marine protection and indemnity mutual insurance corporation or association, authorized to write insurance against liability for loss or damage from personal injury and death, and for other losses and damages, incidental to or in respect of the ownership, operation, or chartering of vessels on a mutual assessment plan, shall be deemed a qualified carrier to insure compensation under this Act. The Secretary may suspend or revoke any such authorization for good cause shown after a hearing at which the carrier shall be entitled to be heard in person or by counsel and to present evidence. No suspension or revocation shall affect the liability of any carrier already incurred.

COMPENSATION FOR INJURIES WHERE THIRD PERSONS ARE LIABLE

33 USC § 933.

SEC. 33. (a) If on account of a disability or death for which compensation is payable under this Act the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

(c) The payment in section 44 shall operate as an assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as "representative") to recover damages against such third person.

(d) Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

(e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to—

(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner);

(B) the cost of all benefits actually furnished by him to the employee under section 7;

(C) all amounts paid as compensation;

(D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 7, to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative, less one-fifth of such excess which shall belong to the employer.

(f) If the person entitled to compensation institutes proceedings within the period prescribed in section 33(b), the employer shall be required to pay as compensation under this Act a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the amount recovered against such third person.

(g) If compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this Act, the employer shall be liable for compensation as determined in subdivision (f) only if such compromise is made with his written approval.

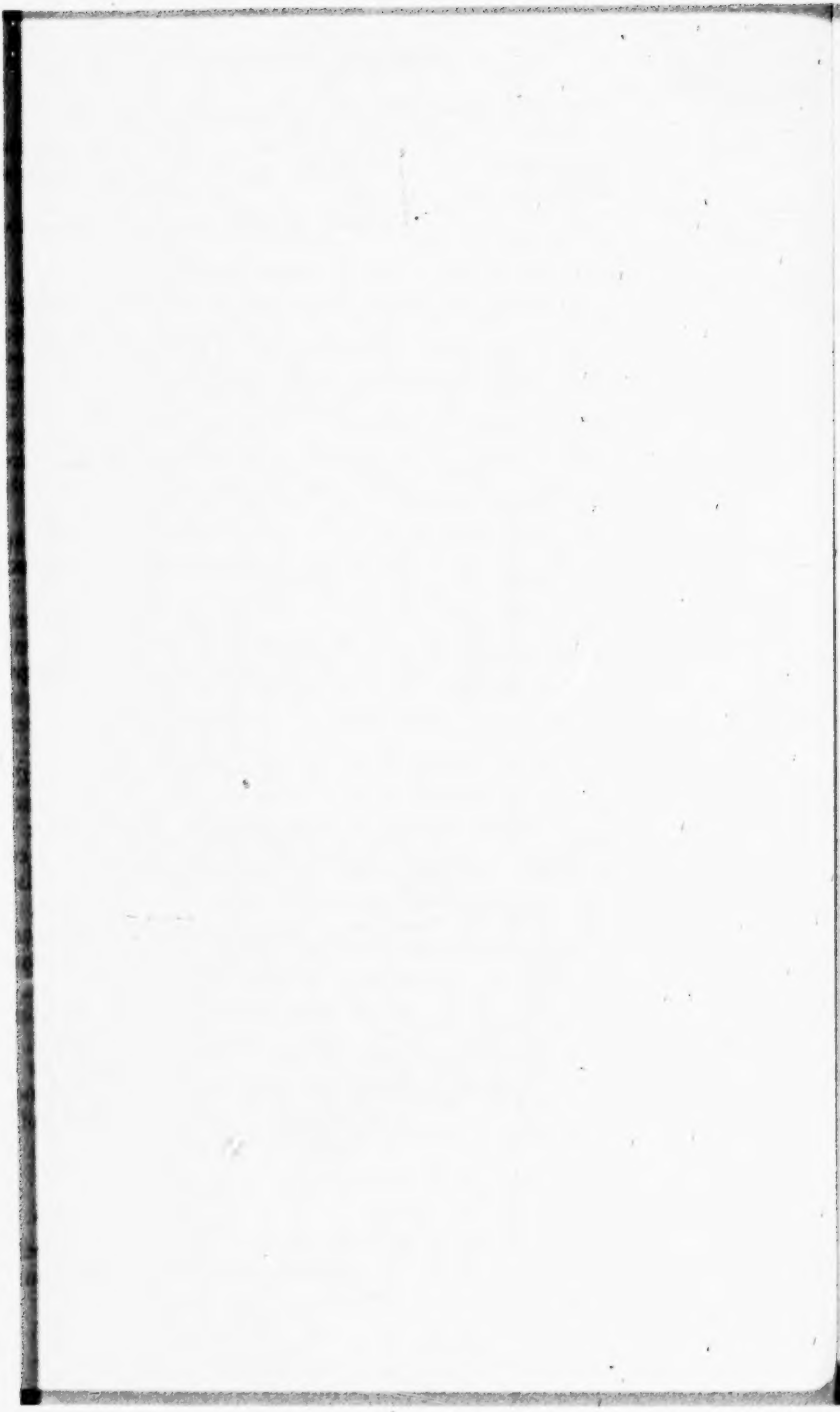
(h) Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section.

(i) The right to compensation or benefits under this Act shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ: *Provided*, That this provision shall not affect the liability of a person other than an officer or employee of the employer.

COMPENSATION NOTICE

33 USC § 934.

SEC. 34. Every employer who has secured compensation under the provisions of this Act shall keep posted in a conspicuous place or



places in and about his place or places of business typewritten or printed notices, in accordance with a form prescribed by the Secretary, stating that such employer has secured the payment of compensation in according with the provisions of this Act. Such notices shall contain the name and address of the carrier, if any, with whom the employer has secured payment of compensation and the date of the expiration of the policy.

SUBSTITUTION OF CARRIER FOR EMPLOYER

33 USC § 935.

SEC. 35. In any case where the employer is not a self-insurer, in order that the liability for compensation imposed by this Act may be most effectively discharged by the employer, and in order that the administration of this Act in respect of such liability may be facilitated, the Secretary shall by regulation provide for the discharge, by the carrier for such employer, of such obligations and duties of the employer in respect to such liability, imposed by this Act upon the employer, as it considers proper in order to effectuate the provisions of this Act. For such purposes (1) notice to or knowledge of an employer of the occurrence of the injury shall be notice to or knowledge of the carrier, (2) jurisdiction of the employer by a deputy commissioner, the Secretary, or any court under this Act shall be jurisdiction of the carrier and (3) any requirement by a deputy commissioner, the Secretary, or any court under any compensation order, finding, or decision shall be binding upon the carrier in the same manner and to the same extent as upon the employer.

INSURANCE POLICIES

33 USC § 936.

SEC. 36. (a) Every policy or contract of insurance issued under authority of this Act shall contain (1) a provision to carry out the provisions of section 35, and (2) a provision that insolvency or bankruptcy of the employer and/or discharge therein shall not relieve the carrier from payment of compensation for disability or death sustained by an employee during the life of such policy or contract.

(b) No contract or policy of insurance issued by a carrier under this Act shall be canceled prior to the date specified in such contract or policy for its expiration until at least thirty days have elapsed after a notice of cancellation has been sent to the deputy commissioner and to the employer in accordance with the provisions of subdivision (c) of section 12.

CERTIFICATE OF COMPLIANCE WITH THIS ACT

33 USC § 937.

SEC. 37. No stevedoring firm shall be employed in any compensa-

tion district by a vessel or by hull owners until it presents to such vessel or hull owners a certificate issued by a deputy commissioner assigned to such district that it has complied with the provisions of this Act requiring the securing of compensation to its employees. Any person violating the provisions of this section shall be punished by a fine of not more than $1,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.

PENALTY FOR FAILURE TO SECURE PAYMENT OF COMPENSATION

33 USC § 938.

SEC. 38. (a) Any employer required to secure the payment of compensation under this Act who fails to secure such compensation shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than $1,000, or by imprisonment for not more than one year, or by both such fine and imprisonment; and in any case where such employer is a corporation, the president, secretary, and treasurer thereof shall be also severally liable to such fine or imprisonment as herein provided for the failure of such corporation to secure the payment of compensation; and such president, secretary, and treasurer shall be severally personally liable, jointly with such corporation, for any compensation or other benefit which may accrue under the said Act in respect to any injury which may occur to any employee of such corporation while it shall so fail to secure the payment of compensation as required by section 32 of this Act.

(b) Any employer who knowingly transfers, sells, encumbers, assigns, or in any manner disposes of, conceals, secretes, or destroys any property belonging to such employer, after one of his employees has been injured within the purview of this Act, and with intent to avoid the payment of compensation under this Act to such employee or his dependents, shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than $1,000, or by imprisonment for not more than one year, or by both such fine and imprisonment; and in any case where such employer is a corporation, the president, secretary, and treasurer thereof shall be also severally liable to such penalty of imprisonment as well as jointly liable with such corporation for such fine.

(c) This section shall not affect any other liability of the employer under this Act.

ADMINISTRATION AND VOCATIONAL REHABILITATION

33 USC § 939.

SEC. 39. (a) Except as otherwise specifically provided, the Secretary shall administer the provisions of this Act, and for such purpose the Secretary is authorized (1) to make such rules and regulations;

(2) to appoint and fix the compensation of such temporary technical assistants and medical advisers, and, subject to the provisions of the civil service laws, to appoint, and, in accordance with the Classification Act of 1923, to fix the compensation of such deputy commissioners (except deputy commissioners appointed under subdivision (a) of section 40) and other officers and employees; and (3) to make such expenditures (including expenditures for personal services and rent at the seat of government and elsewhere, for law books, books of reference, periodicals, and for printing and binding) as may be necessary in the administration of this Act. All expenditures of the Secretary in the administration of this Act shall be allowed and paid as provided in section 45 upon the presentation of itemized vouchers therefor approved by the Secretary.

(b) The Secretary shall establish compensation districts, to include the high seas and the areas within the United States to which this Act applies, and shall assign to each such district one or more deputy commissioners, as the Secretary deems advisable. Judicial proceedings under sections 18 and 21 of this Act in respect of any injury or death occurring on the high seas shall be instituted in the district court within whose territorial jurisdiction is located the office of the deputy commissioner having jurisdiction in respect of such injury or death (or in the United States District Court for the District of Columbia if such office is located in such District).

(c) The Secretary shall direct the vocational rehabilitation of permanently disabled employees and shall arrange with the appropriate public or private agencies in States or Territories, possessions, or the District of Columbia for such rehabilitation. The Secretary may in his discretion furnish such prosthetic appliances or other apparatus made necessary by an injury upon which an award has been made under this Act to render a disabled employee fit to engage in a remunerative occupation. Where necessary rehabilitation services are not available otherwise, the Secretary of Labor may, in his discretion, use the fund provided for in section 44 in such amounts as may be necessary to procure such services, including necessary prosthetic appliances or other apparatus. This fund shall also be available in such amounts as may be authorized in annual appropriations for the Department of Labor for the costs of administering this subsection.

DEPUTY COMMISSIONERS

33 USC § 940.

SEC. 40. (a) The Secretary may appoint as deputy commissioners any member of any board, commission, or other agency of a State to act as deputy commissioner for any compensation district or part thereof in such State, and may make arrangements with such board, commission, or other agency for the use of the personnel and facilities

thereof in the administration of this Act. The Secretary may make such arrangements as may be deemed advisable by him for the payment of expenses of such board, commission, or other agency, incurred in the administration of this Act pursuant to this section, and for the payment of salaries to such board, commission, or other agency, or the members thereof, and may pay any amounts agreed upon to the proper officers of the State, upon vouchers approved by the Secretary.

(b) In any Territory of the United States or in the District of Columbia a person holding an office under the United States may be appointed deputy commissioner and for services rendered as deputy commissioner may be paid compensation, in addition to that he is receiving from the United States, in an amount fixed by the Secretary in accordance with the Classification Act of 1923.

(c) Deputy commissioners (except deputy commissioners appointed under subdivision (a) of this section) may be transferred from one compensation district to another and may be temporarily detailed from one compensation district for service in another in the discretion of the Secretary.

(d) Each deputy commissioner shall maintain and keep open during reasonable business hours an office, at a place designated by the Secretary, for the transaction of business under this Act, at which office he shall keep his official records and papers. Such office shall be furnished and equipped by the Secretary, who shall also furnish the deputy commissioner with all necessary clerical and other assistants, records, books, blanks, and supplies. Wherever practicable such office shall be located in a building owned or leased by the United States; otherwise the Secretary shall rent suitable quarters.

(e) If any deputy commissioner is removed from office, or for any reason ceases to act as such deputy commissioner, all of his official records and papers and office equipment shall be transferred to his successor in office or, if there be no successor, then to the Secretary or to a deputy commissioner designated by the Secretary.

(f) Neither a deputy commissioner nor any business associate of a deputy commissioner shall appear as attorney in any proceeding under this Act, and no deputy commissioner shall act in any such case in which he is interested, or when he is employed by any party in interest or related to any party in interest by consanguinity or affinity within the third degree as determined by the common law.

SAFETY RULES AND REGULATIONS

33 USC § 941.

SEC. 41. (a) Every employer shall furnish and maintain employment and places of employment which shall be reasonably safe for his employees in all employments covered by this Act and shall install,

furnish, maintain, and use such devices and safeguards with particular reference to equipment used by and working conditions established by such employers as the Secretary may determine by regulation or order to be reasonably necessary to protect the life, health, and safety of such employees, and to render safe such employment and places of employment, and to prevent injury to his employees. However, the Secretary may not make determinations by regulation or order under this section as to matters within the scope of title 52 of the Revised Statutes and Acts supplementary or amendatory thereto, the Act of June 15, 1917 (ch. 30, 40 Stat. 220), as amended, or section 4(e) of the Act of August 7, 1953 (ch. 345, 67 Stat. 462), as amended.

(b) The Secretary, in enforcing and administering the provisions of this section, is authorized in addition to such other powers and duties as are conferred upon him—

(1) to make studies and investigations with respect to safety provisions and the causes and prevention of injuries in employments covered by this Act and from time to time make to Congress such recommendations as he may deem proper as to the best means of preventing such injuries, and in making such studies and investigations to cooperate with any agency of the United States or with any State agency engaged in similar work;

(2) to utilize the services of any agency of the United States or any State agency engaged in similar work (with the consent of such agency) in connection with the administration of this section;

(3) to promote uniformity in safety standards in employments covered by this Act through cooperative action with any agency of the United States or with any State agency engaged in similar work;

(4) to provide for the establishment and supervision of programs for the education and training of employers and employees in the recognition, avoidance, and prevention of unsafe working conditions in employments covered by this Act, and to consult with and advise employers as to the best means of preventing injuries;

(5) to hold such hearings, issue such orders, and make such decisions, based upon findings of fact, as are deemed to be necessary to enforce the provisions of this section, and for such purposes the Secretary and the district courts shall have the authority and jurisdiction provided by section 5 of the Act of June 30, 1936 (ch. 881, 49 Stat. 2036), as amended, and the Secretary shall be represented in any court proceedings as provided in the Act of May 4, 1928 (ch. 502, 45 Stat. 490), as amended.

(c) The Secretary or his authorized representative may inspect such places of employment, question such employees, and investigate such conditions, practices, or matters in connection with employment subject to this Act, as he may deem appropriate to determine whether any person has violated any provision of this section, or any rule or

regulation issued thereunder, or which may aid in the enforcement of the provisions of this section. No employer or other person shall refuse to admit the Secretary or his authorized representatives to any such place or shall refuse to permit any such inspection.

(d) Any employer may request the advice of the Secretary or his authorized representative, in complying with the requirements of any rule or regulation adopted to carry out the provisions of this section. In case of practical difficulties or unnecessary hardships, the Secretary in his discretion may grant variations from any such rule or regulation, or particular provisions thereof, and permit the use of other or different devices if he finds that the purpose of the rule or regulation will be observed by the variation and the safety of employees will be equally secured thereby. Any person affected by such rule or regulation, or his agent, may request the Secretary to grant such variation, stating in writing the grounds on which his request is based. Any authorization by the Secretary of a variation shall be in writing, shall describe the conditions under which the variation shall be permitted, and shall be published as provided in section 3 of the Administrative Procedure Act (ch. 324, 60 Stat. 237), as amended. A properly indexed record of all variations shall be kept in the office of the Secretary and open to public inspection.

(e) The United States district courts shall have jurisdiction for cause shown, in any action brought by the Secretary, represented as provided in section 21a of this act, to restrain violations of this section or of any rule, regulation, or order of the Secretary adopted to carry out the provisions of this section.

(f) Any employer who, willfully, violates or fails or refuses to comply with the provisions of subsection (a) of this section, or with any lawful rule, regulation, or order adopted to carry out the provisions of this section, and any employer or other person who willfully interferes with, hinders, or delays the Secretary or his authorized representative in carrying out his duties under subsection (c) of this section by refusing to admit the Secretary or his authorized representative to any place, or to permit the inspection or examination of any employment or place of employment, or who willfully hinders or delays the Secretary or his authorized representative in the performance of his duties in the enforcement of this section, shall be guilty of an offense, and, upon conviction thereof, shall be punished for each offense by a fine of not less than $100 nor more than $3,000; and in any case where such employer is a corporation, the officer who willfully permits any such violation to occur shall be guilty of an offense, and, upon conviction thereof, shall be punished also for each offense by a fine of not less than $100 nor more than $3,000. The liability hereunder shall not affect any other liability of the employer under this Act.

(g)(1) The provisions of this section shall not apply in the case of any employment relating to the operations for the exploration, production, or transportation by pipeline of mineral resources upon the navigable waters of the United States, nor under the authority of the Act of August 7, 1953 (ch. 345, 67 Stat. 462), nor in the case of any employment in connection with lands (except filled in, made or reclaimed lands) beneath the navigable waters as defined in the Act of May 22, 1953 (ch. 65, 67 Stat. 29) nor in the case of any employment for which compensation in case of disability or death is provided for employees under the authority of the Act of May 17, 1928 (ch. 612, 45 Stat. 600), as amended, nor under the authority of the Act of August 16, 1941 (ch. 357, 55 Stat. 622), as amended.

(2) The provisions of this section, with the exception of paragraph (1) of subsection (b), shall not be applied under the authority of the Act of September 7, 1916 (ch. 458, 39 Stat. 742), as amended.

TRAVELING EXPENSES

33 USC § 942.

SEC. 42. The Secretary, deputy commissioners, and other employees of the Secretary shall be entitled to receive their necessary traveling expenses and expenses actually incurred for subsistence while traveling on official business and away from their designated stations, as provided by the Subsistence Expense Act of 1926.

ANNUAL REPORT

33 USC § 943.

SEC. 43. The Secretary shall make to Congress at the beginning of each regular session a report of the administration of this Act for the preceding fiscal year, including a detailed statement of receipts of and expenditures from the funds established in sections 44 and 45, together with such recommendations as the Secretary deems advisable.

SPECIAL FUND

33 USC § 944.

SEC. 44. (a) There is hereby established in the Treasury of the United States a special fund for the purpose of making payments in accordance with the provisions of subsections (f) and (g) of section 8, of subsection (b) of section 18, and of subsection (c) of section 39 of this Act. Such fund shall be administered by the Secretary. The Treasurer of the United States shall be the custodian of such fund, and all moneys and securities in such fund shall be held in trust by such Treasurer and shall not be money or property of the United States.

(b) The Treasurer is authorized to disburse moneys from such fund only upon order of the Secretary. He shall be required to give

bond in an amount to be fixed and with securities to be approved by the Secretary of the Treasury and the Comptroller General of the United States conditioned upon the faithful performance of his duty as custodian of such fund.

(c) Payments into such fund shall be made as follows:

(1) Each employer shall pay $1,000 as compensation for the death of an employee of such employer resulting from injury where the deputy commissioner determines that there is no person entitled under this Act to compensation for such death. The proceeds of this fund shall be available for payments under subsections (f) and (g) of section 8, under subsection (b) of section 18, and under subsection (c) of section 39: *Provided*, That payments authorized by subsection (f) shall have priority over other payments authorized from the fund: *Provided further*, That at the close of each fiscal year the Secretary of Labor shall submit to the Congress a complete audit of the fund.

(2) All amounts collected as fines and penalties under the provisions of this Act shall be paid into such fund.

(d) The Treasurer of the United States shall deposit any moneys paid into such fund into such depository banks as the Secretary may designate and may invest any portion of the funds which, in the opinion of the Secretary, is not needed for current requirements, in bonds or notes of the United States or of any Federal land bank.

(e) Neither the United States nor the Secretary shall be liable in respect of payments authorized under section 8 in an amount greater than the money or property deposited in or belonging to such fund.

(f) The Comptroller General of the United States shall audit the account for such fund, but the action of the Secretary in making payments from such fund shall be final and not subject to review, and the Comptroller General is authorized and directed to allow credit in the accounts of any disbursing officer of the Secretary for payments made from such fund authorized by the Secretary.

(g) All civil penalties provided for in this Act shall be collected by civil suit brought by the Secretary.

ADMINISTRATION FUND

33 USC § 945.

SEC. 45. (a) There is established in the Treasury of the United States a special fund for the purpose of providing for the payment of all expenses in respect of the administration of this Act. Such fund shall be administered by the Secretary. The Treasurer of the United States shall be the custodian of such fund, and all moneys and securities in such fund shall be held in trust by such Treasurer and shall not be the money or property of the United States.

(b) The provisions of subdivisions (b), (d), and (f) of section 44 shall be applicable to the fund established.

APPROPRIATION

33 USC § 946.

SEC. 46. (a) There is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $250,000, which shall be covered into the administration fund established in section 45 and shall be available for expenses incurred in the administration of this Act during the remainder of the fiscal year ending June 30, 1927, and during the fiscal year ending June 30, 1928. All unexpended balances of any appropriations made under authority of this section, remaining in such fund on July 1, 1928, shall be covered into the Treasury of the United States as miscellaneous receipts.

AVAILABILITY OF APPROPRIATIONS

33 USC § 947.

SEC. 47. The expenses incurred for salaries and contingent expenses by the Secretary in the administration (1) of the Act entitled "An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes," approved September 7, 1916, as amended, and (2) of this Act, may be paid from the appropriations for salaries and contingent expenses for the administration of such Act of September 7, 1916, and from the fund established in section 45 of this Act, in such proportion as the Secretary, with the approval of the Director of the Bureau of the Budget, determines to be fairly attributable to the cost of administration of the respective Acts, but the total amount paid from such appropriation and such fund in any fiscal year on account of the administration of such Act of September 7, 1916, shall not exceed the amounts appropriated for salaries and contingent expenses for the administration of such Act for such year.

LAWS INAPPLICABLE

33 USC § 948.

SEC. 48. Nothing in sections 4283, 4284, 4285, 4286, or 4289 of the Revised Statutes, as amended, nor in section 18 of the Act entitled "An act to remove certain burdens on the American merchant marine and encourage the American foreign carrying trade and for other purposes," approved June 26, 1884, as amended, shall be held to limit the amount for which recovery may be had (1) in any suit at law or in admiralty where an employer has failed to secure compensation as required by this Act, or (2) in any proceeding for compensation, any addition to compensation, or any civil penalty.

EFFECT OF UNCONSTITUTIONALITY

33 USC § 949.

SEC. 49. If any part of this Act is adjudged unconstitutional by the courts, and such adjudication has the effect of invalidating any payment of compensation under this Act, the period intervening between the time the injury was sustained and the time of such adjudication shall not be computed as a part of the time prescribed by law for the commencement of any action against the employer in respect of such injury; but the amount of any compensation paid under this Act on account of such injury shall be deducted from the amount of damages awarded in such action in respect of such injury.

SEPARABILITY PROVISION

33 USC § 950.

SEC. 50. If any provision of this Act is declared unconstitutional or the applicability thereof to any person or circumstances is held invalid, the validity of the remainder of the Act and the applicability of such provision to other persons and circumstances shall not be affected thereby.

EFFECTIVE DATE

33 USC § 951.

SEC. 51. Sections 39 to 51, inclusive, shall become effective upon the passage of this Act, and the remainder of this Act shall become effective on July 1, 1927.

Approved, March 4, 1927.

A P P E N D I X A - 3

OUTER CONTINENTAL SHELF LANDS ACT

43 USC 1331, 1332 and 1333

§ 1331. Definitions

When used in this subchapter—

(a) The term "outer Continental Shelf" means all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301 of this title, and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control;

(b) The term "Secretary" means the Secretary of the Interior;

(c) The term "mineral lease" means any form of authorization for the exploration for, or development or removal of deposits of, oil, gas, or other minerals; and

(d) The term "person" includes, in addition to a natural person, an association, a State, a political subdivision of a State, or a private, public, or municipal corporation. Aug. 7, 1953, c. 345, § 2, 67 Stat. 462.

§ 1332. Congressional declaration of policy; jurisdiction; construction

(a) It is declared to be the policy of the United States that the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this subchapter.

(b) This subchapter shall be construed in such manner that the character as high seas of the waters above the outer Continental Shelf and the right to navigation and fishing therein shall not be affected. Aug. 7, 1953, c. 345, § 3, 67 Stat. 462.

§ 1333. Laws and regulations governing lands—Constitution and United States laws; laws of adjacent States; publication of projected States lines; restriction on State taxation and jurisdiction

(a) (1) The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands and fixed structures which may be erected thereon for the purpose of exploring for, developing, removing, and transporting resources therefrom, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: *Provided, however*, That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.

(2) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State as of August 7, 1953 are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf.

(3) The provisions of this section for adoption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom.

Jurisdiction of United States district courts

(b) The United States district courts shall have original jurisdiction of cases and controversies arising out of or in connection with any operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing or transporting by pipeline the natural resources, or involving rights to the natural resources of the subsoil and seabed of the outer Continental Shelf, and proceedings with respect to any such case or controversy may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the adjacent State nearest the place where the cause of action arose.

Applicability of Longshoremen's and Harbor Workers' Compensation Act; definitions

(c) With respect to disability or death of an employee resulting from any injury occurring as the result of operations described in subsection (b) of this section, compensation shall be payable under the provisions of the Longshoremen's and Harbor Workers' Compensation Act. For the purposes of the extension of the provisions of the Longshoremen's and Harbor Workers' Compensation Act under this section—

(1) the term "employee" does not include a master or member of a crew of any vessel, or an officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof;

(2) the term "employer" means an employer any of whose employees are employed in such operations; and

(3) the term "United States" when used in a geographical sense includes the outer Continental Shelf and artificial islands and fixed structures thereon.

Applicability of National Labor Relations Act

(d) For the purposes of the National Labor Relations Act, as amended, any unfair labor practice, as defined in such Act, occurring upon any artificial island or fixed structure referred to in subsection (a) of this section shall be deemed to have occurred within the judicial district of the adjacent State nearest the place of location of such island or structure.

Coast Guard regulations; marking of islands and structures; offenses and penalties

(e) (1) The head of the Department in which the Coast Guard is operating shall have authority to promulgate and enforce such reasonable regulations with respect to lights and other warning devices, safety equipment, and other matters relating to the promotion of safety of life and property on the islands and structures referred to in subsection (a) of this section or on the waters adjacent thereto, as he may deem necessary.

(2) The head of the Department in which the Coast Guard is operating may mark for the protection of navigation any such island or structure whenever the owner has failed suitably to mark the same in accordance with regulations issued hereunder, and the owner shall pay the cost thereof. Any person, firm, company, or corporation who shall fail or refuse to obey any of the lawful rules and regulations issued hereunder shall be guilty of a misdemeanor and shall be fined not more than $100 for each offense. Each day during which such violation shall continue shall be considered a new offense.

Prevention of obstruction to navigation by Secretary of the Army

(f) The authority of the Secretary of the Army to prevent obstruction to navigation in the navigable waters of the United States is extended to artificial islands and fixed structures located on the outer Continental Shelf.

Provisions as non-exclusive

(g) The specific application by this section of certain provisions of law to the subsoil and seabed of the outer Continental Shelf and the artificial islands and fixed structures referred to in subsection (a) of this section or to acts or offenses occurring or committed thereon shall not give rise to any inference that the application to such islands and structures, acts, or offenses of any other provision of law is not intended. Aug. 7, 1953, c. 345, § 4, 67 Stat. 462.

MICHAEL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-241

MR. AND MRS. MALVIN HENNIGAN,
Petitioners-Appellants,

versus

PLACID OIL COMPANY, ET AL,
Respondents-Appellees.

Appeal from United States Court of Appeals for the Fifth Circuit

ORIGINAL BRIEF ON BEHALF OF RESPONDENT-APPELLEE, PENROD DRILLING COMPANY

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IN THE
SUPREME COURT OF THE UNITED STATES
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No. 74-241

MR. AND MRS. MALVIN HENNIGAN,
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Appeal from the United States Court of Appeals for the Fifth Circuit

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ORIGINAL BRIEF ON BEHALF OF RESPONDENT-APPELLEE, PENROD DRILLING COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

STATEMENT OF THE CASE

On November 19, 1971, Gary Neil Hennigan, the son of Mr. and Mrs. Malvin Hennigan, was killed while working in the course and scope of his employment for Penrod Drilling Company on a stationary platform which was located in Louisiana Block 216, Ship Shoal, on the Outer Continental Shelf. He was survived by his mother, father and two sisters.

On October 12, 1972, Mr. and Mrs. Malvin Hennigan filed suit in the United States District Court, Western District of Louisiana, Lafayette Division, against Placid Oil Company, Penrod Drilling Company and Hartford Accident and Indemnity Company. In essence, the plaintiffs contend that Gary Hennigan's death was caused by the negligence of Placid Oil Company and Penrod Drilling Company. There is no contention that Gary Hennigan was a Jones Act seaman.

Penrod Drilling Company (hereinafter sometimes referred to as Penrod) thereafter filed a motion to dismiss and alternatively, a motion for summary judgment. The basis of the motions was that the plaintiffs' exclusive remedy is under the Longshoremen's & Harbor Workers' Compensation Act and that the plaintiffs are precluded from filing a tort action against Penrod, their son's employer. After hearing was held on the motions, the Trial Court granted the motion for summary judgment and dismissed the action against Penrod. Petitioners appealed the ruling to the Court of Appeals for the Fifth Circuit. The Fifth Circuit affirmed the holding of the lower Court, *Hennigan v. Placid Oil Co.*, et al, 496 F.2d 876 (C.A. 5th Cir. 1974). Petitioners are now seeking a writ of certiorari.

ARGUMENT

Under the provisions of the Outer Continental Shelf Lands Act a claim for death of an employee resulting from operations on a structure such as a fixed platform shall be payable under the Longshoremen's & Harbor Workers' Compensation Act.[1] The claim for the death of Gary Hennigan certainly falls in this category.

Since the Longshoremen's & Harbor Workers' Compensation Act is the applicable statute, it is important to review some of its provisions. Title 33, U.S.C.A., Section 905 provides in part:

> "*The liability of an employer prescribed in Section 904 of this title shall be exclusive and in place of all other liability of such employer* to the employee, his legal representative, husband or wife, parents, dependents, next of kins, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death . . ." (Emphasis added)

Simply stated, the effect of the provision is that *all remedies* formerly possessed by an employee (covered by the statute) to proceed, *ex delicto*, under the state law or in admiralty on a cause of action based upon the negligence of the employer, have been superseded and the remedies granted by the Act substituted therefore.[2]

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1 43 U.S.C.A. 1333(b)(c)

2 *Nogueira v. New York, N.H. and N.R. Co.*, 281 U.S. 128, 50 S.Ct. 303; *South Chicago Coal and Dock Co. v. Bassett*, 309 U.S. 251, 60 S.Ct. 544.

In an attempt to circumvent the clear legislative mandate, the petitioners in the instant case argue that since they were not dependent on their son, they should be permitted to pursue a negligence claim against their son's employer.

It strikes the appellee that the petitioners' argument overlooks the underlying purposes which prompted Congress to enact the Longshoremen's & Harbor Workers' Compensation Act. The Act, which is social legislation, was passed for the joint benefit of labor and management in order to insure that employees who became disabled as a result of their labors in hazardous industries would have, during their period of disability, a weekly income for the upkeep of themselves and their families. It was also deemed advisable to provide for compensation, in cases of death, to the person dependent upon the employee. In order that this end might be accomplished, Congress provided for sacrifices to be made by both the employer and the employee. The employee was required to waive rights granted to him under civil and maritime law. The employer, on the other hand, was deprived of the defenses afforded by him. It was a trade for their joint benefit. The net effect of this trade was noted in the recent case of *Nations v. Morris*, 483 F.2d 577, 587 (CA 5th Cir. 1973) when the Court said,

> "Section 905(a) and 933(i) of L and H *completely obliterates the rights at common, civil and maritime law against Employer* and fellow employee. Congress in its unlimited power has determined that the relationship gives rise only to compensation benefits. The nature of the

obligation is that there is no — the word is no-obligation." (Emphasis added)

The issue raised by petitioners is not new in the State of Louisiana. The case of *Rhinehart v. T. Smith and Son*, 14 So. 2d 287 (Orl. Cir. 1943) involved a suit filed by a surviving brother and sister for the death of their brother who drowned when he fell from a barge into the Mississippi River. He had been employed as a longshoreman. The action against Rhinehart's employer was to recover damages under Article 2315 of the Louisiana Civil Code. The defendant-employer filed a number of exceptions, one of which contended that the plaintiffs' exclusive remedy was under the Longshoremen's & Harbor Workers' Compensation Act. Among other things, the plaintiffs contended that since they were not dependent on the deceased and would therefore be without a right to obtain compensation under the Act, they should be permitted to pursue the remedy given to them by Article 2315 of the Louisiana Civil Code. In rejecting this contention the Court said,

> "*Thus, it is apparent that plaintiffs have no right of action to sue for the death of their brother under Article 2315 of the Civil Code, since this right was specifically superseded by Congress in the Longshoremen's & Harbor Workers' Compensation Act.* And, since it is well settled that the death of Rhinehart resulted from an accident arising out of and within the meaning of the Longshoremen's Act and that, if he had left dependents as defined by that statute, they would have been accorded the remedies therein provided, the state court is without jurisdiction to

grant relief to plaintiffs under Article 2315 of the Civil Code." (Emphasis added)

The Louisiana Supreme Court reached the same conclusion when confronted with the issue involving the Louisiana Compensation Act.[3]

The Court of Appeals for the Fifth Circuit has also faced this issue in the case of *Patterson v. Sears, Roebuck & Co.*, 196 F.2d 947 (CA 5th Cir. 1952). In that case the Court held that the Alabama Workmen's Compensation Act provided the exclusive remedy for death damages in cases of employee-employer injuries and that this exclusive remedy was not altered by the fact that the survivors may not have been dependent upon the deceased. This holding was followed by the Supreme Court of Alabama in the case of *DeArman v. Ingalls Iron Works*, 61 So. 2d 764 (1952) and similar decisions are found in four other states.[4]

In support of their case, the petitioners have cited several cases.[5] It is important to note that these cases did not involve the issue which is presented in this case and in each of those cases a vessel was involved, not a fixed platform. Admittedly, a different situation exists where a vessel is involved.

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3 *Atchison, et al v. May*, 201 La. 1003, 10 So.2d 785 (1942)

4 *Shanahan v. Monarch Engineering Co.*, 219 N.Y. 469, 114 N.E. 795; *Gregutis v. Waclark Wire Works*, 86 H.L., 92 A. 354; *Bigby v. Pelican Bay Lumber Co.*, 173 Orl. 682, 147 P.2d 199; *McDonnell v. Berkshire Street Railway Co.*, 243 Mass. 94, 137 N.E. 268

5 *Reed v. Steamship Yaka*, 373 U.S. 412, 83 S.Ct. 1349; *Ryan Stevedore Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124, 76 S.Ct. 232; *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872

The petitioners have also cited the case of *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S.Ct. 1772 (1970). Footnote 11 on page 1784 of that decision reads as follows,

> "In 1927 Congress passed the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U.S.C. Sec. 901, et seq., granting to longshoremen the right to receive workmen's compensation benefits from their employers for accidental injury or death arising out of their employment. *These benefits are made exclusive of any other liability for employers who comply with the Act.* The Act does not, however, affect the longshoreman's remedies against various persons other than his employer, such as a shipowner, and therefore does not bear on the problem before us except perhaps to serve as yet another example of congressional action to allow recovery for death in circumstances where recovery is allowed for nonfatal injuries." (Emphasis added)

In summary, it is the position of the appellee that the exclusive remedy for the death of Gary Hennigan is under the Longshoremen's & Harbor Workers' Compensation Act and petitioners are barred from pursuing a negligence claim against Penrod, their son's employer.

CONCLUSION

Appellee respectfully submits that the Trial Court was correct in granting the motion for summary judgment and dismissing the suit against Penrod Drilling Company. Appellee further submits that the Court of Appeals for the Fifth Circuit was correct in affirming the holding of the lower court.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the above and foregoing brief have been duly mailed to counsel for petitioners, J. Minos Simon, Post Office Box 52116, OCS, Lafayette, Louisiana 70501.

Lafayette, Louisiana, this ____ day of November, 1974.

PATRICK A. JUNEAU, JR.